No. 85-771

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In The

Supreme Court of the United States

October Term, 1985

JOHN RASKIEWICZ,

Petitioner,

vs.

THE TOWN OF NEW BOSTON: MANCHESTER REDIMIX CONCRETE, INC.; *et al,*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Where a citizen has purchased 109 acres of scenic land with a large ridge, containing quality sand and gravel, for the purpose of excavating and selling that product to out-of-state buyers and consequently leveling the land for marketing to the public but is prohibited from doing so by denial of a gravel removal permit by a municipality exercising its regulatory authority:

1. May the lower courts employ their general rule prohibiting ordinary land use disputes from being litigated under 42 U.S.C. § 1983 so as to enter summary judgment against the citizen and sanctions against him and his counsel for filing this suit?

2. May termination of a citizen's law suit, under the First Amendment right of access to the courts, involving years of litigation against the municipality for a gravel permit and damages for a "taking" be suddenly made a condition of the municipality's requirement for granting the permit?

3. May a person's rights under the First Amendment, Fifth Amendment and Fourteenth Amendment be struck down by a municipality exercising a land use regulation without any balancing of the interests of the individual with the interests of the municipality?

4. Does a citizen and his counsel receive due process and First Amendment protection when the lower courts enter sanctions against them, without a show cause hearing, based upon the citizen filing suit in federal court contesting the regulatory authority of a municipality?

5. Whether the lower courts incorrectly applied the law of New Hampshire and of this Court when ruling that application of a local New Hampshire land use regulation is legislative, not

judicial, and that application of a valid regulation in an unconstitutional manner is not a federal issue.

6. Whether the lower courts incorrectly entered summary judgment against petitioner concerning civil rights and anti-trust claims involving conspiracy by basing their rulings on incorrect law, self-serving affidavits of the moving parties and without allowing petitioner any meaningful discovery.

7. Whether the lower courts incorrectly applied Sherman Act principles in holding that no anti-trust claim is shown against a municipality and a gravel company by the municipality's six year denial of a gravel permit so as to prohibit an individual from selling sand and gravel to out-of-state buyers and making available 109 acres of scenic real estate to the public, but immediately granting the same permit to a gravel company after it bought the property at a distressed price due to the lack of the permit.

PARTIES TO THE PROCEEDING

The Town of New Boston, New Hampshire; the Town's Selectmen, Roland Sallada, Thomas Mansfield, George Hawkins, Harold Strong, Oliver Andrews, Merrill Todd; Manchester Redimix Concrete, Inc. and its president, Norman Bissonnette.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding iii

Table of Contents iv

Table of Citations vi

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 4

Factual Background 6

Reasons for Granting the Writ 8

I. The municipality's application of a land use regulation violated Raskiewicz' right to due process and the First Amendment right of access to the courts. 9

A. Violation of The First Amendment and Section 1983 9

B. Errors of Law and Due Process 11

C. The Permit Hearing 12

D. Bias of the Board 13

Contents

Page

E. The Permit Requirements 15

II. The application of a land use regulation that denied a person economically viable use of his property effected a "taking" within the meaning of the just compensation clause..... 16

III. The lower courts departed from fundamental Sherman principles in holding that no anti-trust violation is shown by a municipality applying a land use regulation to prevent a person from excavating and selling sand and gravel in interstate commerce and making available to the public 109 acres of scenic real estate located near the New Hampshire/Massachusetts border but favorably applying the regulation to a sand and gravel corporate competitor so as to develop the same land in a manner denied the individual. 19

IV. The imposition of judicial sanctions, without a hearing, against petitioner and his counsel for filing this suit violated First Amendment protection and denied due process requirements of the Fifth and Fourteenth Amendments 21

Conclusion 24

TABLE OF CITATIONS

Cases Cited: *Page*

Agins v. City of Tiburon, 447 U.S. 255 (1980) 16, 17

American Industries Inc. v. Womentco de Puerto Rico, 556 F. 2d 625 (First Cir. 1977) 22

Annicelli v. Town of South Kingstown, 463 A. 2d 133 (R.I. 1983) 18

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 19

Boddie v. Conn., 401 U.S. 371 (1971) 16

Burrows v. City of Keene, 121 N.H. 590, 432 A. 2d 15 (1981) 16, 18

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972) ... 9, 20

Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 28 S. Ct. 34, 52 L. Ed. 143 (1907) 9

Cloutier v. Town of Epping, 714 F. 2d 1184 (First Cir. 1983) 13, 15

Corby v. Conboy, 457 F. 2d 251 (Second Cir. 1972) 10

Cordeco Development Corp. v. Santiago Vasquez, 539 F. 2d 263 22

Deltona Corp. v. United States, 657 F. 2d 1184 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982) 18

Contents

Page

Devines v. Maier, 665 F. 2d 138 (7th Cir. 1981) 18

Fountain v. Metropolitan Atlanta Rapid Transit Auth., 678 F. 2d 1038 (11th Cir. 1982) 17, 18

Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla.), cert. denied, 454 U.S. 1083 (1981) 18

Harris Trust & Savings Bank v. Duggan, 95 Ill. 2d 516, 449 N.E. 2d 69 (1983)..... 18

Hernandez v. City of Lafayette, 643 F. 2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907 18

Huddleston v. Dwyer, 64 S. Ct. 1015, 322 U.S. 232 (1944) 15

In re Bithoney, 486 F. 2d 319 (1st Cir. 1973) 22

Kaiser Aetna v. United States, 444 U.S. 164 (1979)..... 17

Knight v. City of Billings, 197 Mont. 165, 642 P. 2d 141 (1982)..... 18

Martino v. Santa Clara Valley Water Dist., 703 F. 2d 1141 (9th Cir.), cert. denied, 104 S. Ct. 151 (1983)..... 17

Mathews v. Eldridge, 424 U.S. 319 (1976) 12

McCray v. State of Maryland, 456 F. 2d 1 (Fourth Cir. 1972) 10

McKay v. Hammock, 730 F. 2d 1367 (Tenth Cir. 1984).. 10

Contents

Page

McLain v. Real Estate Bd., 444 U.S. 232 (1980) 19

Memphis Light Gas & Water Div. v. Craft, 346 U.S. 1 (1978) 12

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) 12

Osborn v. City of Cedar Rapids, 324 N.W. 2d 471 (Iowa 1982) 18

Owen v. Lash, 682 F. 2d 648 (Seventh Cir. 1982) 15

Peltier v. Peltier, 548 F. 2d 1083 (First Cir. 1977) 22

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 16, 17

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) .. 17

Pioneer Sand & Gravel v. Anchorage, 627 P. 2d 651 (Alaska 1981) 18

Pratt v. State, 309 N.W. 2d 767 (Minn. 1981) 18

Prune Yard Shopping Center v. Robbins, 447 U.S. 74 (1980) 17

Rippley v. City of Lincoln, 330 N.W. 2d 505 (N.D. 1983) 18

Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984) ... 17

Contents

Page

Ryland v. Shapiro, 708 F. 2d 967 (Fifth Cir., 1983) 10, 11

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981).....17, 18

Sedima, S.P.R.L. v. Imrex Company, Inc. No. 83-7965 (July 25, 1984)..... 5

Suess Builders Co. v. City of Beaverton, 294 Or. 254, 656 P. 2d 306 (1982)..... 18

United States v. Central Ureka Mining Co., 357 U.S. 155 (1958)..... 17

United States v. Employing Plasterers Assoc., 347 U.S. 186 (1954)..... 19

United States v. Yellow Cab Co., 332 U.S. 218 (1947)... 19

Williamson County Regional Planning Commission, et al., v. Hamilton Bank of Johnson City, 729 F. 2d 402 .. 17

Winslow v. Town of Holderness Planning Bord, et al., 480 A. 2d 114 (1984).....12, 13, 15

Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)..... 10

Zinn v. State, 112 Wis. 2d 417, 334 N.W. 2d 67 (1983).. 18

Statutes Cited:

15 U.S.C. § 1.....3, 6

Contents

Page

15 U.S.C. § 15 5

18 U.S.C. § 1961 5

18 U.S.C. § 1968 5

24 U.S.C. § 1254(1) 2

28 U.S.C. § 455 21

42 U.S.C. § 1981 5

42 U.S.C. § 1983 .....i, 6, 9, 10, 16, 17

42 U.S.C. § 1985 17

42 U.S.C. § 1985(3) 5

United States Constitution Cited:

First Amendment.....i, 2, 6, 7, 8, 9, 10, 11, 15, 21

Fifth Amendment .....i, 3, 6, 16 17, 21

Fourteenth Amendment.....i, 2, 6, 10, 21

Other Authorities Cited:

Ethical Consideration 7-23, American Bar Association "Code of Professional Responsibility and Canons of Judicial Ethics" (1970) 23

APPENDIX

Page

Opinion of United States Court of Appeals for the First Circuit 1a

Memorandum, Opinion and Order of the United States District Court for the District of New Hampshire ... 18a

Judgment of United States Court of Appeals for the First Circuit Entered February 7, 1985 ..... 44a

Judgment of the United States District Court for the District of New Hampshire Dated January 13, 1984..... 45a

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THE TOWN OF NEW BOSTON: MANCHESTER REDIMIX CONCRETE INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on February 7, 1985, affirming the summary judgment entered against him by the United States District Court for the District of New Hampshire following a hearing.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (U.S.C.A. 84-1154) appears in the Appendix hereto.

The opinion of the United States District Court for the District of New Hampshire, which includes its findings of fact and conclusions of law, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1985. On May 6, 1985 petitioner's application for an extension of time in which to file this petition was allowed extending the filing period to July 7, 1985. This petition is being filed by that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

United States Constitution, Fourteenth Amendment Section I:

> " . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Civil Rights Act, 42 U.S.C. § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any state . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

STATEMENT OF THE CASE

Petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the First Circuit, (1a-17a, 44a),[1] affirming the opinion and judgment of the federal District Court for the District of New Hampshire allowing motions for summary judgment filed by respondents, a New Hampshire municipality and a sand and gravel corporation (18a-43a, 45a). The District Court held one hearing, after which summary judgment was entered, approximately six (6) months after respondents were served with petitioner's amended complaint. During this period, petitioner had filed request for admissions served upon each respondent (App. 105, 116, 127, 138, 149, 160, 171, and 545) and sent notices to take depositions and requests to produce documents to respondent Town (App. 192, 458, 462) and to respondent Redimix by its president (App. 183). Respondents filed motions to extend time to respond to the petitioner's request for admissions (App. 200, 271, 561), and then to quash petitioner's other discovery requests and for protective orders (App. 233, 236, 465). Although the Town's motion to quash was denied, it moved the court to reconsider that ruling (App. 327). At the time the District Court held its hearing, discovery was at a standstill pending resolution of these motions; no depositions had been taken, only the Town had produced a few documents in response to petitioner's first document requests (App. 324); and few responses had been filed to petitioner's requests for admissions, and most of those responses were filed on the day of the hearing and subsequent to the hearing (App. 606, 610, 613).

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1. References to the record are as follows: The Appendix before this Court is abbreviated as "a" preceded by page number; the Appendix before the Court of Appeals is abbreviated at "App." followed by page number; applicable numbered paragraphs are designated "¶" followed by number.

This case involves claims of bias and conspiracy. The petitioner, John Raskiewicz, (hereinafter the "petitioner" or "Raskiewicz") for six years was denied an earth products removal permit to remove gravel from his land by the selectmen of the Town of New Boston, a New Hampshire municipality (hereinafter the "Board"). After four years of state court litigation to obtain the permit and damages for a "taking", denial of the permit was then based on his refusal to surrender his First Amendment right to challenge, by means of his state court suit, the regulatory authority of the Board. After six years of litigation, effort and expense Raskiewicz was forced to sell his land to respondent sand and gravel company (hereinafter, "Redimix") for a distressed price. Redimix applied to the Board and received the permit without delay.

Within three years after learning of the Board's grant of the gravel permit to Redimix, Raskiewicz commenced this action in the United States District Court for the District of New Hampshire, naming as parties defendant the Town, members of the Board, Redimix, its president and several of the individual townspeople who had been granted "intervenor" status in the state proceeding. Raskiewicz alleged federal claims arising under the United States Constitution, civil rights laws, anti-trust statutes, and Civil RICO, as well as pendent claims on questions of state law all arising from the defendants' actions and their consequences as to the denial of the gravel permit. Some of his claims were waived on appeal to the First Circuit.[2] The claims before the United States

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2. In light of *Sedima, S.P.R.L. v. Imrex Company, Inc.* No. 83-7965 (July 25, 1984) [holding that a criminal conviction is a condition precedent to civil damages liability under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982), Raskiewicz waived continued litigation under the civil RICO statute. Petitioner further waived prosecution of the antitrust allegations under the Clayton Act, 15 U.S.C. § 15; 42 U.S.C. § 1981 and 42 U.S.C. § 1985(3). Also petitioner's appeal did not include federal claims against the townspeople (intervenors), only New Hampshire state law claims which Raskiewicz contends the District Court should have heard as pendent claims.

Court of Appeals for the First Circuit were brought pursuant to 42 U.S.C. § 1983, due process and just compensation under the Fifth Amendment, due process under the Fourteenth Amendment, right of access to the courts under the First Amendment, and violation of the Sherman Act, 15 U.S.C. § 1 (12a).

Raskiewicz contends that violation of his federal constitutional rights, as enumerated above, was sufficiently shown to easily overcome the summary judgment motions filed and entered against him. The facts he was allowed to present are taken from the transcript of the state court proceeding[3] and from documents put into evidence by respondents in support of their motions to dismiss and for summary judgment.

Factual Background

Since 1964, Raskiewicz had owned approximately 109 acres of land situated north of the Town, fronting on the area's major road and located within a short driving distance to Massachusetts, (the "property"). The property is dominated by an esker, or ridge, composed of sand and gravel suitable for excavation and sale for use in highway construction (App. 799, 836-839, 989). Following the anticipated removal of the sand and gravel over a period of years, Raskiewicz planned to develop the leveled property for residential or commercial uses (App. 484 ¶ 9, 1071-1074). In 1974 Raskiewicz applied to the Board for a gravel removal permit, the following actions then occur:

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3. The case, styled "*Raskiewicz v. Strong, et al.*" No. E1329, was filed in the Hillsborough Superior Court in Manchester, N.H. (App. 1256-1261). The transcript of that proceeding, which was considered by the District Court below, was incorporated in the Appendix before the Court of Appeals at Volume II beginning at page 788. The petitioner modified the Appendix by adding a page of the state record. As this page shows, the state proceedings involved a justice who is the United States district judge who heard this case below.

The Board conducts a hearing and denies Raskiewicz a gravel permit based on technical and complicated objections that he was not notified of before the hearing and denies him the right to a rehearing in order to hire experts and answer the objections (App. 1226, 1230, 1250, 1256). The Board grants gravel permits to other corporations and individuals operating sand and gravel excavating businesses, including an enterprise located on adjacent land (App. 353 ¶ 2, 360 ¶ 26, 872-873, 958-962); Raskiewicz sues the Town and its selectmen for the permit and damages for a "taking" including Selectman Sallada[4] (4a, 20a; App. 1256-1261); townspeople spontaneously join in the proceedings as "intervenors" supporting the Town's actions, some have since claimed they never knew they were parties to the suit (App. 616);[5] Board Member Sallada states Raskiewicz will never get a permit and subsequently sits on the Board that continually denies Raskiewiz the permit (4a-6a; App. 489). After four years, the Board's requirements for the permit suddenly include that Raskiewicz give up his First Amendment right to continue his state court suit for the permit and damages for a "taking" and then denies him the permit for exercising this First Amendment right (6a-7a, 33a-34a).

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4. "In 1974 petitioner had filed suit . . . in the Hillsborough Superior Court naming as defendants Harold Strong, George Hawkins, and Roland Sallada, as individuals and as the selectmen for the Town of New Boston. Raskiewicz v. Strong, et al., #E1329. Raskiewicz claimed that the earth products removal ordinance was adopted in violation of New Hampshire law and, as applied, amounted to a taking of his property without just compensation. He also contended that the Board's decision was 'unreasonable and unlawful, arbitrary and capricious and contrary to the facts as stated.' " (App. 1256-1261). No final judgment has ever been entered in this case (20a).

5. The Gallups, listed "intervenor" parties, executed an affidavit during the appeal of this action which sets forth that they never authorized or hired anyone to list them or represent them as an "intervenor" party in the state proceedings.

The Board also denies him a one year permit because he requests a permit that will be effective for one year (21a).[6] Raskiewicz sells his land to Redimix at a distressed price and the Board promptly grants the permit to Redimix (10a, 15a). Defending its actions in Raskiewicz' state court proceedings, the Town hires a law firm whose partner was and is on the Board of Directors of Redimix and handles Redimix legal work (App. 404; 10a n.2). Bissonnette, the president of Redimix, freely makes statements that could be construed to refer to arrangements made with the Town by his counsel (App. 468; 8a-9a).

REASONS FOR GRANTING THE WRIT

The courts below defied constitutional principles by ignoring due process and just compensation rights, as well as First Amendment and Sherman Act protection. By applying judicial authority as a rigid barrier to an individual's right to contest the regulatory power of a municipality, the lower courts have eliminated any balancing of the competing interests involved. An individual's attempt at betterment, through entrepreneurship, has no place in the rigid standards followed by the courts below. Were the judgment here challenged not be reviewed and ultimately reversed, the scope and meaning of these once clear principles would be brought into conspicuous question. The writ should therefore be granted and the judgment summarily reversed or the case set for plenary briefing and argument.

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6. The Court of Appeals adopted the argument of counsel for the Town that petitioner's requested change to the permit involved specific calendar dates. The finding of the District Court was based upon the document itself which was introduced by the Town in support of motions for dismissal and summary judgment.

I.

THE MUNICIPALITY'S APPLICATION OF A LAND USE REGULATION VIOLATED RASKIEWICZ' RIGHT TO DUE PROCESS AND THE FIRST AMENDMENT RIGHT OF ACCESS TO THE COURTS.

A. Violation of The First Amendment and Section 1983

Aside from 26 draconian conditions that Raskiewicz had to agree to in order to be given the permit, the Board required dismissal of petitioner's five and six years of litigation for the permit and damages for a "taking" of his property without just compensation. The imposition of such a requirement and the refusal to grant the permit for non-compliance with this requirement constituted an attempt by the Board to unlawfully limit petitioner's right of access under the First Amendment and punishment for exercising this right.

In *Chambers v. Baltimore & Ohio Railroad,* 207 U.S. 142, 28 S. Ct. 34, 52 L. Ed. 143 (1907), the Supreme Court characterized the right of access in the following terms: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution." 207 U.S. 148, 28 S. Ct. 35 (citations omitted). In *California Motor Transport Co., v. Trucking Unlimited,* 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972), this Court reaffirmed that: ". . . the right to petition extends to all departments of government. The right of access to the courts is indeed but one aspect of the right of petition." *Id.*, 92 S. Ct. 612.

A number of circuit courts have ruled that interference with this First Amendment right is a violation of 42 U.S.C. § 1983. *McCray v. State of Maryland,* 456 F. 2d 1, 6 (Fourth Cir. 1972); *Corby v. Conboy,* 457 F. 2d 251, 253 (Second Cir, 1972): ". . . the complaint states a cause of action under § 1983. Prisoners no less than other persons have a constitutional right of access to the courts" (citations omitted); *McKay v. Hammock,* 730 F. 2d 1367, 1375 (Tenth Cir. 1984): "The right of access to the courts is constitutionally protected. Thus, conduct under color of law which interfers with that right gives rise to a cause of action under § 1983."; *Ryland v. Shapiro,* 708 F. 2d 967, 971 (Fifth Cir., 1983). "The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution." The Fifth Circuit also finds that since the complaint alleges deprivations of property without due process, dismissal of the actions could amount to a deprivation of procedural due process under the Fourteenth Amendment (*Ryland, supra,* 972).

In *Wolff v. McDonnell,* 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), this Court defined the right of access in a civil rights action under § 1983 in the following terms: "The right of access to the courts, upon which *Avery* was premised, is founded in the due process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." (*Wolff,* 418 U.S. 579).

Petitioner's First Amendment claim was viewed as frivolous by the lower courts: "The court is perplexed by such a claim and again can only see it as a frivolous attempt to raise federal jurisdiction. Even the shabbiest of lawyering practice requires that in settling a suit you bargain to have any pending actions dropped." (33a). The Court of Appeals concurs in this assessment (15a n.6). What is missing is the distinction between "bargaining" between individual parties to a suit and a governmental body

threatening to economically punish a person by regulatory enforcement unless First Amendment rights are given up. To allow a municipality to apply its regulations in this manner precludes the judicial role of determining the proper balance to be accorded such fundamental competing interests. The judiciary and the right to petition are to be no more than a condition for a permit.

The Town's participation in the state court case raises additional factors. Refusal to produce documents, lack of timely response, and a position that disappeared when Redimix owned the land infer bad faith and a disposition to delay the prosecution of Raskiewicz's suit in violation of § 1983.[7]

B. Errors of Law and Due Process

The Board's ordinance authority required a public hearing and that interested parties (abutting land owners) be notified (App. 16 ¶ 15, 323). The ordinance affects only those who seek to remove earth products from land in the Town and would have great impact on such persons and relatively little impact on other persons or town residents.

The lower courts found that application of land use regulations by a New Hampshire municipality was a legislative function for purposes of determining due process requirements (14a n.5, 30a). The New Hampshire Supreme Court holds that such actions: "Must be characterized as judicial or quasi-judicial (citations omitted), at least for the purpose of deciding whether

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7. As the Fifth Circuit stated: ". . . we have previously held that 'if state officers conspired . . . . in such a way as to defeat or prejudice a litigant's rights in a state court, that would amount to a denial of equal protection of the laws by persons acting under color of state law.' (citations omitted). Conduct by state officers which results in delay in the prosecution of an action in state court may cause such prejudice. . . " *Ryland, supra* at 974.

the rights of the parties were adequately protected; *i.e.*, whether due process requirements were met. Other jurisdictions have adopted a similar view." (citations omitted). *Winslow v. Town of Holderness Planning Board, et al.*, 408 A. 2d 114, 116 (1984). Incorrectly designating the Board's actions as legislative, rather than judicial, adversely colored all aspects of the lower courts' rulings regarding petitioner's suit.

C. The Permit Hearing

The initial permit hearing was continued ostensibly to allow Raskiewicz to submit a revised plan for the location of a driveway on the property. The later hearing was not, however, limited to the subject as to which it had been continued. Instead, a new series of complicated objections were raised. Raskiewicz had no notice that the Board would entertain any further objections at the continued permit hearing, the Board simply denied the permit. Raskiewicz then requested a rehearing in writing, promising to address the new objections. The rehearing was denied (App. 1251-1256).

It is well-settled that adequate notice is a fundamental element of due process and fairness. *Memphis Light, Gas & Water Div. v. Craft,* 346 U.S. 1, 16 (1978); *Mathews v. Eldridge,* 424 U.S. 319, 349 (1976). Without notice of the subject of a hearing, the hearing formalities themselves are pointless, especially if the hearing relates to highly technical subjects for which preparation of data and analysis by experts are crucial. *See Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 314 (1950) (notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

D. Bias of the Board

The *Winslow* case involved the vote of a planning board member concerning a proposal he spoke in favor of before he became a member of the board (*Winslow, supra,* 115). The New Hampshire court ruled that a Board member's favorable disposition to the proposal constituted pre-judgment. And since the Board's action was quasi-judicial, citing the First Circuit, *Cloutier v. Town of Epping,* 714 F. 2d 1184, 1191 (First Cir., 1983); this pre-judgment was: ". . . a cause for disqualification from a quasi-judicial function of a board.", and the planning board's decision must be held invalid.[8]

The lower courts found that in 1976 Board Member Sallada made the statement that John Raskiewicz, petitioner, would never receive a permit. This statement was made in the hallway of the courthouse during proceedings concerning Raskiewicz's state court claim against the Town. Subsequent to this statement, Mr. Sallada was a member of the Board in 1977, 1978 and 1979, when petitioner Raskiewicz, in accordance with the ruling of the state court, applied to the Board for a permit but was denied by unanimous decision during each of these years (5a-7a):

> "Raskiewicz submitted a detailed plan outlining his proposed gravel operation, but the Board

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8. "This brings us to the principal question raised in this appeal: whether the master erred in applying to this case the rule that: 'judicial action by a tribunal one of whose members is disqualified to act is voidable if the disqualified member participates therein, without reference to the fact whether the result is produced by his vote.' *Rollins v. Connor,* 74 N.H. 459, 69 A. 778. The *Rollins* court held that mere participation by one disqualified member was sufficient to invalidate the tribunal's decision because it was impossible to estimate the influence one member might have on his associates." *Winslow, supra,* at 117. ". . . we believe that the requirement of impartiality demands application of Rollins rule to planning boards in cases like this one. . . " *Winslow, supra,* at 118.

> refused to grant a permit on the basis of this plan in September of 1977 . . . the parties continued to negotiate until January 10, 1978 when the Board offered Raskiewicz a permit subsequent to a number of terms and conditions. Among the conditions of the permit was a requirement that Raskiewicz dismiss his legal action against the Board in the Hillsborough Superior Court." (6a).

Raskiewicz requested that the permit be changed to read "date of issuance to one year later" (7a, 21a). Issuance of a permit 5-7 months after the effective calendar date would result in a significantly different permit. "The Board waited seven (7) months before deciding that this was an unauthorized change and that nothing further would be done with Raskiewicz' application at that time" (7a, 21a). Apparently requesting a permit effective for one year was a ground for denying Raskiewicz a one year permit.

In April 1979, Raskiewicz and his counsel met with the Selectmen, but these negotiations proved unfruitful, Raskiewicz requested another court hearing but the state court never acted on this request. During August, 1979, the Board again offered Raskiewicz a one year permit subject to terms and conditions and the requirement that he dismiss his state court action. Raskiewicz refused on the grounds that this requirement was illegal and unconstitutional (7a, 21a).

In December 1979, Raskiewicz sold his land to respondent Redimix for what he termed a distressed price (9a). In negotiating the sale of the land, Raskiewicz was told by Bissonnette, the president of Redimix, that his company would have no problem obtaining a permit, and that Raskiewicz had better sell to his company at the price stated because he would never find another buyer due to his inability to obtain a permit (8a). After purchasing

the land, Redimix applied for and was granted the permit without delay.

The lower courts are not impressed by these facts. The district judge views the whole affair as just; ". . . the rough and tumble of the democratic political process.", *citing Cloutier, supra* (41a). Incorrectly defining the Board's actions as legislative, rather than judicial, no doubt contributed to this negative assessment. The Board's actions cannot be construed as due process and just the actions of Selectman Sallada require a finding of bias and invalidity of the Board's denial of a permit to Raskiewicz (*Winslow, supra*). It is well settled that if a federal court, when ruling on a question of state law, incorrectly applies state law in arriving at its decision, this decision must be reversed on appeal. *Huddleston v. Dwyer,* 64 S. Ct. 1015, 322 U.S. 232 (1944).

E. The Permit Requirements

The requirements of due process were succinctly set forth by the Seventh Circuit in *Owen v. Lash,* 682 F. 2d 648 (Seventh Cir. 1982). Justice Stewart (Retired) of the United States Supreme Court, sitting by designation in the Court of Appeals, held that the District Court had incorrectly viewed due process as mere procedural requirements when addressing allegations of a First Amendment violation (*Owen, supra,* 652-653). The Court of Appeals also found that a single act in violation of the First Amendment could simultaneously constitute a violation of substantive constitutional rights and of procedural due process (*Owen,* 652 n.4).

The lower courts are also of the opinion that since the "zoning ordinance used here to deny the plaintiff his sand and gravel permit is recognized as constitutional, any claim that the plaintiff raises as to an arbitrary or unreasonable denial of his constitutional rights resulting from application of the ordinance against him

raises state constitutional questions and not a § 1983 action" (29a). Support for this ruling is based on the New Hampshire Supreme Court's findings in *Burrows v. City of Keene,* 121 N.H. 590, 432 A. 2d 15 (1981). However, this is not the finding of the *Burrows* court.[9]

In addition, this lower court ruling directly contradicts the holding of this Court in *Boddie v. Conn.,* 401 U.S. 371, 379 (1971):

> ". . . a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question."

II.

THE APPLICATION OF A LAND USE REGULATION THAT DENIED A PERSON ECONOMICALLY VIABLE USE OF HIS PROPERTY EFFECTED A "TAKING" WITHIN THE MEANING OF THE JUST COMPENSATION CLAUSE.

The Fifth Amendment states in clear and unequivocal terms: "Nor shall private property be taken for public use, without just compensation." It is well established that a regulation can affect a Fifth Amendment taking. *Agins v. City of Tiburon,* 447 U.S. 255 (1980); *Penn Central Transportation Co. v. New York City,*

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9. "Planners and other officials should be aware of possible personal liability for bad faith violations of a landowner's constitutional rights which may go beyond the damages recoverable for inverse condemnation. Cities and towns should also be aware of possible 42 U.S.C. § 1983 actions for damages for violations of the Constitutional rights of citizens to compensation for injuries suffered" (citing this Court). *Burrows,* 121 N.H. 599.

438 U.S. 104 (1978); *Prune Yard Shopping Center v. Robbins,* 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States,* 444 U.S. 164, 174 (1979); *United States v. Central Ureka Mining Co.,* 357 U.S. 155, 168 (1958); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).

This Court in *Ruckelshaus v. Monsanto Co.,* 104 S. Ct. 2862 (1984), reaffirmed as a principle of law that a regulation can affect a taking. This principle of law has been held to apply to zoning laws. *Agins v. City of Tiburon,* 447 U.S. at 260. In the recent case of *Williamson County Regional Planning Commission, et al. v. Hamilton Bank of Johnson City,* 729 F. 2d 402, the Sixth Circuit Court of Appeals reversed a federal district court ruling and imposed damages under the Fifth Amendment against a planning commission's application of its zoning ordinances against Hamilton for the consequent taking of its property. Hamilton filed suit pursuant to the provisions of 42 U.S.C. § 1983 and § 1985. Hamilton argued that the actions of the defendants constituted a violation of its federal constitutional rights under the just compensation clause of the Fifth Amendment.

In addition to the Sixth Circuit, Justice Brennan's opinion set forth in *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 647-53 (1981) has been cited with approval by the Fifth, Seventh, Ninth and Eleventh Circuits as well as by the Court of Claims. In addition the Supreme Court of Alaska, Florida, Minnesota, North Dakota, Wisconsin and New Hampshire have upheld Justice Brennan's opinion. In addition, the Supreme Courts of Illinois, Iowa, Montana, Oregon and Rhode Island have agreed that land use taking must be compensable without citing *San Diego Gas.*[10]

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10. *Martino v. Santa Clara Valley Water Dist.,* 703 F. 2d 1141, 1148 (9th Cir.), *cert. denied,* 104 S. Ct. 151 (1983); *Fountain v. Metropolitan Atlanta*

(Cont'd)

The New Hampshire Supreme Court, *citing San Diego Gas,* 101 S. Ct. at 1304, has recognized that zoning ordinances and other land use restrictions could destroy the use and enjoyment of property, such that just compensation was required.[11] And as stated in *Burrows,* petitioner had a right to damages during the time period that he was deprived of the economical use of his land. *Burrows, supra,* 599.

(Cont'd)

Rapid Transit Auth., 678 F. 2d 1038, 1043 (11th Cir. 1982); *Devines v. Maier,* 665 F. 2d 138, 142 (7th Cir. 1981); *Deltona Corp. v. United States,* 657 F. 2d 1184, 1190 (Ct. Cl. 1981), *cert. denied,* 455 U.S. 1017 (1982); *Hernandez v. City of Lafayette,* 643 F. 2d 1188, 1199 (5th Cir. 1981), *cert. denied,* 455 U.S. 907; *Pioneer Sand & Gravel v. Anchorage,* 627 P. 2d 651, 652 n.2 (Alaska 1981); *Graham v. Estuary Properties, Inc.,* 399 So. 2d 1374, 1383 (Fla.), *cert. denied,* 454 U.S. 1083 (1981); *Harris Trust & Savings Bank v. Duggan,* 95 Ill. 2d 516, 449 N.E. 2d 69 (1983); *Osborn v. City of Cedar Rapids,* 324 N.W. 2d 471 (Iowa 1982); *Pratt v. State,* 309 N.W. 2d 767, 774 (Minn. 1981); *Knight v. City of Billings,* 197 Mont. 165, 642 P. 2d 141 (1982); *Burrows v. City of Keene,* 121 N.H. 590, 597, 432 A. 2d 15, 19 (1981); *Rippley v. City of Lincoln,* 330 N.W. 2d 505, 510 (N.D. 1983); *Suess Builders Co. v. City of Beaverton,* 294 Or. 254, 656 P. 2d 306 (1982); *Annicelli v. Town of South Kingstown,* 463 A. 2d 133 (R.I. 1983); *Zinn v. State,* 112 Wis. 2d 417, 428-29, 334 N.W. 2d 67, 72-73 (1983).

11. "Property in the constitutional sense is not the physicial thing itself but rather is the group of rights which the owner of the thing has with respect to it. (Citation omitted.) The term refers to a person's right to 'possess, use, enjoy and dispose of a thing is not limited to the thing itself.' " (Citation omitted.) "It matters not to the owner whether the use of his land is taken from him by actual physical invasion or condemnation or whether he is prevented from using it by regulation . . . arbitrary or unreasonable restrictions which substantially deprive the owner of the 'economically viable use of his land in order to benefit the public in some way constitute a taking within the meaning of our New Hampshire constitution requiring payment of just compensation." *Burrows v. City of Keene,* 121 N.H. 590, 598 (1981).

III.

THE LOWER COURTS DEPARTED FROM FUNDAMENTAL SHERMAN PRINCIPLES IN HOLDING THAT NO ANTI-TRUST VIOLATION IS SHOWN BY A MUNICIPALITY APPLYING A LAND USE REGULATION TO PREVENT A PERSON FROM EXCAVATING AND SELLING SAND AND GRAVEL IN INTERSTATE COMMERCE AND MAKING AVAILABLE TO THE PUBLIC 109 ACRES OF SCENIC REAL ESTATE LOCATED NEAR THE NEW HAMPSHIRE/MASSACHUSETTS BORDER BUT FAVORABLY APPLYING THE REGULATION TO A SAND AND GRAVEL CORPORATE COMPETITOR SO AS TO DEVELOP THE SAME LAND IN A MANNER DENIED THE INDIVIDUAL.

The lower courts concluded that there was an insufficient nexus with interstate commerce to support federal jurisdiction under the Sherman Act (36a-37a). The lower courts ignored the evidence on the record that the alleged illegal actions of the defendants prevented the entry of Raskiewicz into a business involving interstate sales of gravel and sales of commercial or residential lots. Since those actions cause elimination of interstate trade, and a reduction in competition, the effect on commerce for jurisdictional purposes is both direct and sufficient. As long as the alleged restraint affects "some appreciable part of interstate commerce," the jurisdiction prerequisite over that restraint is fulfilled. *United States v. Yellow Cab Co.*, 332 U.S. 218, 225 (1947). The restraint can exist at either end of the continuum of interstate trade, even though the restraint itself is not interstate in character or execution. *See United States v. Employing Plasterers Assoc.*, 347 U.S. 186, 189 (1954). The effect itself is evaluated as a "matter of practical economics", *McLain v. Real Estate Bd.*, 444 U.S. 232, 246 (1980), and the total impact on commerce need only be substantial in the sense that it actually exists. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 485 (1940).

Raskiewicz has alleged collusive activity by the Board, Redimix and others designed to deny him a permit to remove his gravel and thus to prevent him from going into business (App. 59-60 ¶ 2-3). Without a permit, Raskiewicz was effectively barred from engaging in the business of the sale of interstate gravel and the value of the property to him was essentially negated (App. 484 ¶ 9, 486 ¶ 14). The record discloses that the petitioner had planned to remove up to 300,000 cubic yards of gravel each year (App. 1219-1220). The petitioner's affidavit establishes that he was already in a business involving sales interstate and that he intended to sell his gravel to out-of-state buyers (App. 483-484 ¶ 8). In fact, several such buyers had already expressed interest to him concerning such purchases (App. 483-484 ¶ 8).

On this record, interstate commerce was affected in distinct ways: first, an interstate business contemplated by Raskiewicz was blocked from entry into the marketplace; and second, a resource that would have been sold interstate was effectively locked up in the hands of a competitor. It is difficult to imagine a more direct effect on interstate commerce that the elimination of a segment of that commerce.

The present case presents assurances that the petitioner's gravel business would have involved interstate sales (App. 483-484 ¶ 8). The respondents have made no showing pursuant to Rule 56 even to suggest that the contemplated transportation of gravel by Raskiewicz would somehow be limited in area. Raskiewicz was already engaged in interstate sales in other aspects of his ongoing business indicating a present ability to engage in such transactions (App. 483 ¶ 8). In addition, a witness with out-of-state business testified to the high quality of the gravel, and out-of-state buyers had expressed an interest in purchases from the property (App. 1110, 1120-1121, 484 ¶ 8). And the Board's actions also involve Sherman Act violations as discussed by this Court in *California Motor Transport Co.*, 404 U.S. at 511-515.

IV.

THE IMPOSITION OF JUDICIAL SANCTIONS, WITHOUT A HEARING, AGAINST PETITIONER AND HIS COUNSEL FOR FILING THIS SUIT VIOLATED FIRST AMENDMENT PROTECTION AND DENIED DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS.

Counsel and Mr. Raskiewicz have been sanctioned by the District Court judge for filing this complaint. Sanctions were entered without the benefit of a show cause hearing and without any meaningful review by the Court of Appeals. To merely mention the sanctions, as the Court of Appeals does, cannot be considered judicial review. It is apparent from the decisions of the lower courts that these sanctions were imposed as punishment for instituting litigation in this matter. In essence petitioner and his counsel are being punished for exercising the First Amendment right of access to the courts.

As mentioned earlier, (*infra,* n.3), the District Court judge was also a state judge in Raskiewicz state court proceedings against the Town. 28 U.S.C. § 455 states in pertinent part as follows:

> "Disqualification of justice, judge or magistrate: (a) any justice, judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned. (b) he shall also disqualify himself in the following circumstances:
>
> A. Where he has personal bias or prejudice concerning a party, or personal knowledge of the disputed evidentiary facts concerning the proceeding; . . ."

The factual record in this case is sufficient to negate any inference that Raskiewicz or his trial counsel intentionally instituted a frivolous action. That record discloses a course of conduct by the respondents which supports reasonable inferences that the Board had pre-judged Raskiewicz' application and that the Board and Redimix had conspired with others to impede or prevent action on the Raskiewicz application.

Even the First Circuit has recognized that sanctions must be carefully applied—only in extraordinary circumstances and only when absolutley required by justice. *See Cordeco Development Corp. v. Santiago Vasquez, supra,* 539 F. 2d at 263. Sanctions require more than a showing of a legally inadequate case. *Americana Industries, Inc. v. Wometco dePuerto Rico,* 556 F. 2d 625, 628 (First Cir. 1977). A complaint must be so frivolous as to lack "even a modicum of supportive logic" before costs will be assessed against a plaintiff. *Peltier v. Peltier,* 548 F. 2d 1083, 1084 n.3 (First Cir. 1977).[12]

Other cases in which challenges to town zoning actions had been rejected were apparently relied upon by the District Court in attributing bad faith to Raskiewicz, personally, and to his trial attorney. These cases were decided while petitioner's action was in suit. The pattern of the Town's delay, its unconstitutional and

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12. This strict standard is absolutely necessary to "insure that there is breathing room for the fullest exercise of the advocacy function." *In re Bithoney,* 486 F. 2d 319, 322 (1st Cir. 1973):

> "A precondition to [an award of fees] is the finding of an intentional institution of an action which one knows to be fictitious and wholly without merit and which is done for the specific purpose of frustrating and harassing lawfully instituted legal procedures."

Id. at 1084.

oppressive requirements, and its prompt grant of the permit to the successor-owner applicant distinguishes this case dramatically from those zoning precedents.[13]

The imposition of sanctions was improper and the District Court judge should have recused himself from hearing this case. In addition, Raskiewicz' claims have raised issues ruled favorably upon by this Court, a number of Circuit Courts, and the State Supreme Court of New Hampshire. To hold that zoning claims are run of the mill and to view such claims as suspect does not make for a foundation based on due process. To impose sanctions for raising issues, that even the lower court states need a decision by the Supreme Court, only points out the strong feelings held by the lower courts regarding these issues. John Raskiewicz and his counsel did not receive due process and the lower courts evidenced such strong feelings in this matter as to cloud their judgment and commit errors of law in justifying their decisions.

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13. Ethical Consideration 7-23 American Bar Association "Code of Professional Responsibility and Canons of Judicial Ethics," (1970), recognizes that even if squarely adverse precedent is brought to the attention of the court it may properly be challenged by an attorney in whole or in part. Where, as here, factual distinctions exist between the instant case and earlier unfavorable cases, a finding of bad faith is entirely unwarranted.

CONCLUSION

At its core, the right to due process reflects a fundamental value in our American constitutional system. The health of the national body politic presupposes the capacity of its several organs, state and local, to equitably balance the benefits and interests of local needs with the rights of the individual. To ensure that this balance is maintained, this Court should grant certiorari to review the decision below.

Respectfully submitted,

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APPENDIX
OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 84-1154

JOHN RASKIEWICZ,
Plaintiff-Appellant,

v.

THE TOWN OF NEW BOSTON, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Martin F. Loughlin, *U.S. District Judge*]

Before Campbell, *Chief Judge,*

McGowan,* *Senior Circuit Judge,*

and Torruella, *Circuit Judge.*

Ronald F. Kehoe with whom *Samuel Adams, Susan S. Dunn, Christopher E. Nolin, Warner & Stackpole* and *Thomas F. Sullivan* were on brief for appellant.

Leslie C. Nixon with whom *David L. Nixon* and *Brown and Nixon Professional Association* were on brief for the Town of New Boston.

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* Of the District of Columbia Circuit, sitting by designation.

Opinion

Eugene M. Van Loan, III with whom *Wadleigh, Starr, Peters, Dunn and Chiesa* was on brief for Manchester Redimix and Norman Bissonnette.

Rodney L. Stark with whom *Stark & Peltonen, P.A,* was on brief for Patricia L. (Getman) Andrews.

February 7, 1985

CAMPBELL, *Chief Judge.* Plaintiff John Raskiewicz appeals from a decision of the United States District Court for the District of New Hampshire granting defendants' motions for summary judgment and ordering Raskiewicz and his counsel to "equally recompense all defendants for their expenses and reasonable attorneys['] fees." In reviewing the district court's grant of summary judgment, we explore the record in some detail, setting forth the facts in the light most favorable to Raskiewicz, who is the party opposing the summary judgment motion. We emphasize that the following summary is not intended to be a complete statement of what actually happened, but only a selective version of record materials tailored, where possible, in Raskiewicz's favor.

A resident of Nashua, New Hampshire, Raskiewicz is in the logging and logging supply business. In 1964, he purchased approximately 109 acres of land situated on Route 13 in the Town of New Boston, New Hampshire, for $4,000. The property is dominated by an esker, or ridge, composed of sand and gravel suitable for excavation and sale. The only activity Raskiewicz conducted on the New Boston property was the removal of timber, but he states that he intended to excavate and sell the gravel and sand and then to develop the leveled property for residential or commercial uses.

Opinion

In 1972, New Boston passed an "Ordinance to Regulate Removal of Earth Products in the Town of New Boston." The ordinance prohibits removal of earth products in the town except with a permit from the Board of Selectmen. It also specifies requirements to be met and factors for the Board to consider but does not require the Board to issue a permit. The ordinance provides that a permit will be valid only for 12 months from the date of issuance, although the Board may approve renewals if certain conditions are met. The Board granted gravel removal permits to individuals and businesses in New Boston both before and after Raskiewicz unsuccessfully attempted to obtain a permit.

Raskiewicz first applied for a permit in March 1974. He inquired of the Board about the formalities of the permit process and was assisted by the Board in filling out the required form. In accordance with the ordinance, the Board held a public hearing on Raskiewicz's application on May 2, 1974. The Board did not reach a decision at the hearing because a question arose about the location of a proposed driveway from Raskiewicz's property to the highway. The Board scheduled a second hearing for May 16, 1974, which was rescheduled at Raskiewicz's request for June 6, 1974. At the second hearing, the Selectmen, town residents, and Selectman Nickerson from Goffstown, New Hampshire, raised numerous new objections relating to potentially damaging effects Raskiewicz's plan might have on the water table in the area, the amount of truck traffic on Route 13, silt erosion into a nearby river, the water levels in wells on Raskiewicz's property, and the scenic beauty of the area. Raskiewicz understood the continued hearing to be solely concerned with the location of the driveway, and he therefore was not prepared to meet these new objections. Although Raskiewicz offered to respond to the objections after obtaining experts' analyses, the Board refused to continue the permit hearing until a later date. On June 13, 1974, the Board

notified Raskiewicz that his application was denied. Raskiewicz then filed a written request for a rehearing on June 28, which the Board denied without explanation on July 12, 1974. In June 1974, Raskiewicz also requested that the Board provide him with certain public records and minutes of Board meetings related to his application for a permit. Raskiewicz renewed his request in July and made repeated attempts to view the records. No documents were produced until April 1975.

In August 1974, Raskiewicz filed a petition for declaratory judgment and appeal from the Board's decision on his motion for rehearing in the Hillsborough County Superior Court, naming as defendants Harold Strong, George Hawkins, and Roland Sallada, as individuals and as the Selectmen for the Town of New Boston. *Raskiewicz v. Strong,* No. E-1329. Raskiewicz claimed that the earth products removal ordinance was adopted in violation of New Hampshire law and, as applied, amounted to a taking of his property without just compensation. He also contended that the Board's decision was "unreasonable and unlawful, arbitrary and capricious and contrary to the facts as stated." Finally, Raskiewicz argued that the ordinance did not apply to him because he intended to construct non-commercial buildings on his property after the esker was leveled and that the extraction was therefore exempt from the terms of the ordinance.

In October 1974, 28 townspeople filed motions to intervene on behalf of the Selectmen in Raskiewicz's state court action. In spite of Raskiewicz's opposition, the court allowed the motion as to 19 of the townspeople. The only action taken by the intervenors in the state court litigation appears to be a motion for discovery from Raskiewic; filed on September 4, 1975, which motion was later waived by agreement on October 10, 1975. On February 25, 1976 counsel for the intervenors moved to withdraw from the case "because the said intervenors have indicated to

counsel that they do not wish further representation in [the] matter." After the superior court granted counsel's motion on April 6, 1976, the intervenors apparently ceased participating in the state litigation.

On April 6, 7, 8, and 13, 1976, a master heard testimony in the state court proceeding. During these hearings, Lars Ohman was in the courthouse hallway waiting to be called to testify for Raskiewicz when Selectman Roland Sallada approached him and stated to him "that John Raskiewicz would never be given a gravel permit."[1] On April 22, 1976, the master issued an order stating that "the parties have agreed to further negotiate and the petitioner will file a new application with the Town of New Boston for a permit to remove sand and gravel. It is further agreed that the case may be continued."

The negotiations proved unsuccessful, according to Raskiewicz, because of the Board's failure to cooperate. Raskiewicz applied for further hearings. The master held a hearing on June 28, 1977, as a result of which he recommended an order to the state court "to which there is no objection." The order provided a timetable by which (1) Raskiewicz would submit a "written detailed proposal" for his gravel removal operation; (2) the Town would notify Raskiewicz of its "specific areas of concern, additional information required and, to the extent possible, what conditions they are considering as applying to the permit"; (3)

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1. Raskiewicz also states in his affidavit that "[w]hile my case was pending in the Hillsborough Superior Court, I was approached by Roland Sallada, who at that time was a selectman for the Town of New Boston, and he informed me that I would never be given a permit to remove sand and gravel from my land." At argument, Raskiewicz's counsel concentrated on Sallada's alleged statement to Ohman.

Raskiewicz would respond to the Board's problems; and (4) the Board would render a decision. The order also provided that "[i]n the event that the parties are unable to reach an accord under this order, the recessed hearing shall be rescheduled upon the request of either party . . . ." On July 8, 1977, the court approved the order, and the "Decree [was] entered accordingly." Although the parties at argument seemed unsure as to the exact procedural posture of the state court action, the docket in that case shows that judgment was entered on September 6, 1977.

Raskiewicz submitted a detailed plan outlining his proposed gravel operation, but the Board refused to grant him a permit on the basis of this plan in September 1977. That same month, the Board sent to Raskiewicz 47 questions concerning his application; Raskiewicz responded to the questions in November. The parties continued to negotiate until January 10, 1978 when the Board offered Raskiewicz a permit subject to a number of terms and conditions. Among the conditions of the permit was a requirement that Raskiewicz dismiss his legal action against the Board in the Hillsborough Superior Court. Raskiewicz agreed to the Board's requirements but requested that certain changes be made in the terms and conditions of the proposed permit.

On May 24, 1978, the Board notified Raskiewicz that it accepted certain of his amendments and that "the permit has now been issued to become effective July 1, 1978 and to expire June 30, 1979. The change in date has been made to allow you adequate time to review this matter. It is our understanding of the Order of the Hillsborough County Superior Court that this amended permit, if acceptable to you, will serve to terminate the pending litigation."

Opinion

Raskiewicz agreed to the Board's amendments but changed the dates of the permit to July 1, 1979 and June 30, 1980, to allow him to prepare his gravel removal operation. The Board waited seven months before deciding that this was an unauthorized change and that nothing further was to be done with Raskiewicz's application at that time. During 1978, Raskiewicz states that he made numerous attempts to discover and comply with the requirements of the Board, but the Board refused to issue the permit or give Raskiewicz any guidelines as to what he had to do to secure the permit.

In April 1979, Raskiewicz and his counsel met with the Selectmen and agreed to commence further negotiations. Raskiewicz states that the Board subsequently refused to comply with this April agreement. As a result, in July 1979, Raskiewicz requested that the state court master conduct another hearing. The state court apparently never acted on Raskiewicz's request, and he apparently did not pursue it.

On August 14, 1979, the Board again issued Raskiewicz a permit, subject to all the terms and conditions of the May 24, 1978 permit and effective from September 1, 1979 to September 1, 1980. Raskiewicz states that he refused the permit because he felt that the condition forcing him to dismiss his state court suit was illegal and unconstitutional.

Raskiewicz contends that "[w]orn down by enduring actions causing harassment and obstruction," he "reasonably concluded that nothing he did would cause the town selectmen to issue him the said permit." He therefore retained a real estate broker to sell the property in the summer of 1979. His broker informed Raskiewicz that because buyers would assume that the Board would not issue a permit to extract gravel and sand from the

property, the value of the land was lower than it would have been had Raskiewicz secured a permit.

Raskiewicz's broker contacted Manchester Redimix Concrete, Inc. ("Redimix"), which had had no prior involvement with Raskiewicz or the town according to the uncontested affidavits of Redimix's President, Norman E. Bissonnette, its Vice President who conducted the negotiations with Raskiewicz, Peter Dowling, and Selectmen Todd and Mansfield. Redimix is a New Hampshire corporation with its principal place of business in Manchester, New Hampshire.

Raskiewicz asserts that when he first met with Bissonnette, he told Bissonnette of his five-year struggle to obtain a permit. Raskiewicz states that Bissonnette

> told me this was not a problem for him. He made other statements to the effect that his lawyer had talked with the attorney for the Town of New Boston. I also told him that Selectman Nickerson of Goffstown had objected to my receiving a permit. He told me that Goffstown had been taken care of. Mr. Bissonnette offered me only one price on a take it or leave it basis. Also he would not pay me the full purchase price but only a down payment and the remainder to be paid over 3 years at 6% interest. He told me I had better take his offer because no one else would buy my property because of my inability to obtain a permit to remove sand and gravel. He made statements to the effect that he and his company would have no problem obtaining a permit. When I objected

> to the low price and unfair terms of this proposal concerning the down payment and the remainder over 3 years at only 6% interest he said take it or leave it.[2]

In December 1979, Redimix purchased Raskiewicz's property for $217,000. Raskiewicz contends that the actual fair value of his land, based on the amount and quality of the sand and gravel on it, was "in the millions of dollars."

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2. Raskiewicz also points out that the attorney representing the Town of New Boston in the state court action, Stephen Spielman, was a member of the firm of Devine, Millimet, Stahl & Branch of Manchester, New Hampshire, and that another member of that firm, Joseph A. Millimet, was and is on the Board of Directors of Redimix and handles Redimix's legal work. Millimet's uncontradicted affidavit establishes, however, that the Devine firm did not represent the Town of New Boston generally; Spielman, a member of the Devine firm from 1974 through December 31, 1976, represented the town in two earth permit disputes, *Everett Tingley v. Town of New Boston* and *John Raskiewicz v. Strong;* and Spielman took the cases with him when he left to form his own firm and entered new appearances as counsel in each of the cases on behalf of that firm, O'Neil, Backus, Spielman & Little. Millimet also avers that

> At no time did any officer or employee of Manchester Redimix Concrete, Inc. request me to seek to have Attorney Stephen Spielman or anyone else in behalf of the Town of New Boston deny an earth products removal permit to John Raskiewicz.
>
> . . .
>
> [T]he only involvement of Devine, Millimet, Stahl & Branch in the purchase of the New Boston property in question from John Raskiewicz was with respect to reviewing purchase and sale documents, conducting a title search and handling a closing.

Opinion

On March 20, 1980, a representative of Redimix attended a New Boston Selectmen's meeting to inquire about obtaining a permit for excavation on the Raskiewicz property. In March 1980, the Selectmen were Thomas Mansfield, Merrill Todd, and Ray Lowell (now deceased). Neither Mansfield nor Todd recall having any contact with Redimix before that date. The minutes of the meeting provide that the representative sought "to be advised whether the Raskiewicz Gravel Removal Permit could be changed to the Manchester Redimix Co. as they are satisfied to work under the same regulations and this would save time involved in undergoing another hearing . . . . Selectman Mansfield was in doubt as to the proper procedure, preferring to consult with town counsel prior to giving a definite answer." The Selectmen subsequently held a hearing on Redimix's application, which Raskiewicz attended. Raskiewicz states that the intervenors did not object to Redimix's application and none of the objections raised with respect to his permit were voiced at the hearing. In September or October of 1980, Raskiewicz learned that the Board had granted Redimix's application in July 1980. The Redimix permit contained substantially the same terms and conditions imposed in the Raskiewicz permit.

In April 1983, Raskiewicz filed suit in the United States District Court for the District of New Hampshire, naming as defendants the Town of New Boston, the individuals who had served as Selectmen over the course of Raskiewicz's permit battle (Roland Sallada, Harold Strong, George Hawkins, Thomas Mansfield, Sr., and Oliver Andrews), Redimix and its President, Norman E. Bissonnette, and the 28 townspeople who had sought to intervene in the state court proceedings. Raskiewicz's amended complaint, filed in June 1983, stretched over 85 pages and contained 19 counts. Briefly stated, Raskiewicz alleged that some or all of the defendants (1) conspired to deprive him of his

fourteenth amendment due process and equal protection rights in contravention of 42 U.S.C. §§1981, 1983 and 1985(3); (2) conspired to violate and violated the Sherman Act, 15 U.S.C. §1, and the Clayton Act, 15 U.S.C. §15; (3) conspired to violate and violated the RICO Act, 18 U.S.C. §§1961 *et seq.;* and (4) committed a myriad of state law violations, including malicious use of judicial process, negligent and intentional infliction of emotional distress, inverse condemnation, fraud, and interference with advantageous business relationships and opportunities. The gravamen of the complaint is that because of defendants' "personal bias and malice . . . rooted in their desire to acquire for themselves or others the ownership of plaintiff's land for the purpose of obtaining economic profit from the use of the land," defendants conspired to deny Raskiewicz a permit and that, as a result of this conspiracy, Raskiewicz was unable to use the land in the most profitable manner and was forced to sell his property to Redimix for less than full value. Raskiewicz prayed for $90 million in damages, plus interest, costs and attorneys' fees.

In August and September, the defendants filed various motions to dismiss and for summary judgment, supported by affidavits, copies of minutes from Selectmen's meetings, and copies of the permits offered Raskiewicz and accompanying correspondence. Raskiewicz resisted these motions and filed memoranda and affidavits in support of his cause. During this period, disputes over discovery requests and timing also arose so that as of the date of the hearing, December 16, 1983, there had been in excess of 140 filings or docket markings in the action and 23 motions were pending before the court (eight motions to dismiss, four summary judgment motions, and 11 motions relating to other matters).

As Raskiewicz concedes, the district court "granted considerable latitude to all the parties in the scope of their

arguments during the day-long hearing, including a detailed oral review of the factual background of the Raskiewicz permit process, as well as references to settlement discussions . . . ." The parties had previously submitted copies of the state court orders and a copy of the transcript of the state court proceedings.

On January 13, 1984, the district court granted defendants' motions for summary judgment as to all Raskiewicz's claims. It held, in pertinent part, that Raskiewicz failed to state a federal section 1983 claim and that Raskiewicz's antitrust claims failed for lack of an interstate nexus.[3] The court, having disposed of the federal law claims before trial, chose not to exercise jurisdiction over Raskiewicz's state law claims. Finally, the court found that "the frivolous unfounded and reckless actions of both plaintiff and his counsel" warranted an award of attorneys' fees and costs to defendants to be paid by Raskiewicz and his counsel.

On this appeal, Raskiewicz waives his civil RICO, Clayton Act, and 42 U.S.C. §§1981, 1985(3) claims against New Boston and the Selectmen. He also does not appeal from the dismissal of his federal causes of action against the townspeople. Thus, before this court are Raskiewicz's section 1983 and Sherman Act claims, as well as the pendent state law claims.

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3. The court concluded that

> For the above reasons and where matters beyond and outside the pleadings have been submitted and considered by the court, the court finds it appropriate that summary judgment be granted each and every defendant. The court has found no cognizable federal issues which justify prolonging this action or allowing it to reach a jury.

Opinion

In determining whether summary judgment is appropriate, the court must review the record in the light most favorable to the moving party. *Poller v. Columbia Broadcasting System,* 368 U.S. 464 (1962). The court also must indulge all inferences favorable to the party opposing the motion. *United States v. Diebold,* 369 U.S. 654 (1962). "These rules must be applied with recognition of the fact that it is the function of summary judgment, in the time hallowed phrase, 'to pierce formal allegations of facts in the pleadings . . . .' and to determine whether further exploration of the facts is necessary." *Hahn v. Sargent,* 523 F.2d 461, 464 (1st Cir. 1975) (citations omitted), *cert. denied,* 425 U.S. 904 (1976). After an extensive review of the record, we conclude that because "the facts upon which appellant relied to support his allegation[s] were not susceptible of the interpretation which he sought to give them, appellees met their burden of showing the absence of any genuine issue of material fact." *Manego v. Cape Cod Five Cents Savings Bank,* 692 F.2d 174 (1st Cir. 1952) (footnote omitted).

We begin by noting that this court has repeatedly said that federal courts do not sit as a super zoning board or a zoning board of appeals. *See, e.g., Chiplin Enterprises, Inc. v. City of Lebanon,* 712 F.2d 1524 (1st Cir. 1983); *Cloutier v. Town of Epping,* 714 F.2d 1184 (1st Cir. 1983); *Creative Environments, Inc. v. Estabrook,* 680 F.2d 822 (1st Cir.), *cert. denied,* 459 U.S. 989 (1982). While the Supreme Court has yet to provide precise analysis concerning claims of this sort, we feel confident that where, as here, the state offers a panoply of administrative and judicial remedies, litigants may not ordinarily obtain federal court review of local zoning and planning disputes by means of 42 U.S.C. §1983.

Raskiewicz argues that "[b]ecause of the presence of bias, the present case is not governed by the general rule prohibiting ordinary land use disputes from being litigated under §1983." Charges of bias, bad faith, and other "opprobrious epithets of malice," however, are commonplace in cases of this nature. *Creative Environments,* 680 F.2d at 830. *See, e.g., Chiplin,* 712 F.2d at 1527-28; *Cloutier,* 714 F.2d at 1189.[4] If all that were required to secure federal jurisdiction were loose claims of conspiracy and corruption, virtually any case of this type could be brought into the federal court. Here, even assuming — which is unclear — that Raskiewicz, in alleging bias and conspiracy, is implicitly alleging actual corruption[5] on the part of the Board

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4. *Every* appeal by a disappointed developer from an adverse ruling by a local Massachusetts planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason.

Creative Environments, 680 F.2d at 833.

5. The source of the Board's alleged bias is left unclear. In his complaint, Raskiewicz alleges that personal biases motivated the Board to deny his permit. On appeal, he suggests that the Board denied him a permit because he was not as politically influential as Redimix (although Redimix, like Raskiewicz, is a nonresident of New Boston), because the Board and Redimix made an agreement to deny Raskiewicz a permit (*but see infra,* pages 18-19) or because the Board sought to "accommodat[e] . . . a constituent's unlawful demands to foreclose the Plaintiff's ability to sell gravel to interstate buyers." Without suggesting where the line is to be drawn, the members of local boards have considerable leeway for the free exercise of their personal views before any possible due process claim might exist, assuming without deciding that such a claim would ever be maintainable in this context. Raskiewicz has provided no basis for inferring that that line has been approached, let alone crossed.

and Redimix, and that sufficiently serious, supported, assertions of this type could make out a due process claim under section 1983 (a matter we do not now decide), the record falls far short of creating a genuine issue of material fact with respect to such a claim.

Raskiewicz argues that the Board's allegedly uncooperative conduct during the course of the permit application process and the state court proceedings, Selectman Sallada's statement that "John Raskiewicz would never be given a gravel permit," and the Board's prompt grant of a permit to Redimix, a potential competitor of Raskiewicz's, all support an inference that the Board was biased against him. Raskiewicz also contends that Bissonnette's statement that Redimix would have no difficulty obtaining a permit supports his allegation of conspiracy. At argument, Raskiewicz's counsel asserted that the Sallada and Bissonnette statements were particularly probative of bias and conspiracy.

We see nothing that supports an inference of actual bias, let alone corruption. The Board's conduct in the application proceedings and state court action was not probative of illegal bias. Indeed, there is no indication that the Board's treatment of Raskiewicz's case was any different from the treatment accorded other applicants. Further, any negative inference to be drawn from the purportedly "key" statement by Sallada that Raskiewicz would never be given a permit is completely negated by the fact that the Board did in fact twice offer Raskiewicz a permit although it was not required by the ordinance to do so.[6]

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6. Raskiewicz does not argue that the permit offered him was a sham because its substantive terms and conditions were unduly onerous or contrary to local practice. We find no impropriety in the one condition that Raskiewicz contends made the permit unacceptable, the requirement that he drop his state

(Cont'd)

Raskiewicz's inference of conspiracy, a necessary ingredient, also, of his antitrust claim, is even less compelling. We are required to respect all inferences that reasonably can be drawn from the facts, but we cannot ignore uncontested facts that render inferences unreasonable or, in this case, fantastic. It is uncontested that Redimix had no involvement with the town or Raskiewicz before Raskiewicz's agent contacted the company in the summer or fall of 1979. At that point in time, Raskiewicz had twice been offered a permit after extensive negotiations, had chosen not to accept them, and, by his own admission, had given up his quest for a permit. The timing of Redimix's entry on the scene alone punctures the inference that the Board and Redimix conspired to deprive Raskiewicz of a permit during the years he sought one (1974-1979). Moreover, the fact that Redimix tried to accept the very permit offered Raskiewicz and eventually received a permit containing terms and conditions similar to those imposed on Raskiewicz dispels any inferences of conspiracy or bias to be drawn from Bissonnette's confidence that he could secure a permit and the Board's prompt grant of a permit to Redimix.[7] We therefore find

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(Cont'd)

court suit, because as the district court noted, "[e]ven the shabbiest of lawyering practice requires that in settling a suit you bargain to have any pending actions dropped."

7. Raskiewicz argues that the court should have permitted him to conduct additional discovery before granting summary judgment. He also asserts that because state of mind is an element of his claim, the court should have applied a more lenient standard. In view of the length of time that this dispute was brewing, however (the challenged events occurred before 1980, and the state court proceedings had been brought in 1974), as well as its patent facial insubstantiality as a federal court matter, we see no abuse in the court's denial of further discovery. *See Hahn*, 523 F.2d at 467 ("Promises that evidence would be forthcoming were not enough."). Moreover, application of a different standard would not have altered the result; "[w]hile we believe that the plaintiff

(Cont'd)

no material issue as to either the section 1983 or Sherman Act claims.

We have discussed this case in greater detail than it deserves to illustrate that the district court's conclusion that Raskiewicz's federal claims were "totally frivolous and unwarranted" was completely justified. We therefore affirm the court's award of attorneys' fees and costs to the defendants.

We have held that "smoke alone is not enough to force the defendants to trial to prove that their actions were not" improper. *Manego,* 692 F.2d at 177; *Packish v. McMurtrie,* 697 F.2d 23, 27 (1st Cir. 1983). Here, we do not even see the smoke. *Packish,* 697 F.2d at 27. In view of the frivolous nature of this appeal, we order that Raskiewicz be taxed with double costs.

Affirmed.

(Cont'd)

is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture." *Hahn,* 523 F.2d at 467 (quoting *Manganaro v. Delaval Separator Co.,* 309 F.2d 389, 393 (1st Cir. 1962)).

MEMORANDUM, OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

#C83-198-L

John Raskiewicz

v.

Town of New Boston, et al.

MEMORANDUM, OPINION AND ORDER

This is a civil action brought by the plaintiff John Raskiewicz, a resident of Nashua, New Hampshire and the former owner of a certain parcel of land located on the easterly side of River Road (Route 13), in the Town of New Boston, New Hampshire. Named as defendants are the Town of New Boston (hereinafter Town) five (5) Selectmen for the Town, Manchester Redimix Concrete, Inc., Norman Bissonnette and twenty-eight (28) other named individuals.[1] The plaintiff's amended complaint spans eighty-five (85) pages, includes a fifteen (15) page statement of the facts and bases the defendants' liability on nineteen (19) separate counts. The original complaint was filed with the court on April 14, 1983 but service was not made until mid-June. Since that time there have been in excess of one hundred forty (140) filings or docket markings in this action.

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1. Four named defendants have been dismissed since the filing of the complaint pursuant to the provisions of Fed. R. Civ. P. 41(a)(1)(ii).

Memorandum, Opinion and Order

Currently pending before the court are some twenty-three (23) motions of which eight (8) are motions to dismiss, four (4) are motions for summary judgment and eleven (11) relate to other matters. An extensive statement of the relevant facts follows which includes a narration of those most favorable to the plaintiff.

On or about December, 1964, the plaintiff purchased the parcel of land on Route 13 in New Boston referred to above. Said land contained, and now contains a large esker of high quality sand and gravel along with other earth products. In 1972 the Town adopted "An Ordinance to Regulate Removal of Earth Products from New Boston" which requires a written permit before the removal of any earth products except for the purpose of non-commercial residential buildings. The plaintiff's property apparently remained idle until 1974 when he applied to the Board of Selectmen for the Town for an earth products removal permit. At that time he had been in the logging business for a number of years and had recently entered the business of selling logging supplies. He had purchased the New Boston property with the apparent intent to expand his business into the sand and gravel field. He intended to sell sand and gravel establishing a plant for the purpose of concrete and to establish a wet plant for processing the material on his property. After having leveled the property he believed it would have become very marketable as residential or commercial property. Along with his application he filed the required topographical map denoting the existing and final contours of the property to be affected and the $25.00 filing fee. After a period of time and two public hearings, the plaintiff was notified of the denial of his application. He requested a rehearing but was denied.

Upon the denial of his permit and request for rehearing the plaintiff, through his attorney, requested that the Board of

Selectmen provide him with the public records in their care regarding his application as well as certain other relevant documents. No documents were produced until April of 1975. Prior to that however, on August 12, 1974 the plaintiff filed a petition for declaratory judgment and other relief in the Hillsborough County Superior Court based on the denial of his permit. The suit named three (3) selectmen individually and as selectmen for the Town as defendants. Thereafter on October 24, 1974 twenty-eight individuals supporting the actions of the selectmen moved to intervene as defendants in the case. Said intervenors are also named as defendants in the instant action. Discovery was had and several hearings were held in an attempt to resolve the matter but the record from that court, and the pleadings filed here are unclear as to whether or not a final order was issued in that action.

Numerous attempts were made both prior and subsequent to the Hillsborough action to resolve the differences between the Town and the plaintiff regarding the issuance of his permit. On or about September 16, 1976 the plaintiff and his attorney met with the Town Selectmen and their attorney for the purpose of establishing guidelines for the plaintiff to follow in applying for his permit. Subsequent to the September 16 meeting a hearing was set on the matter in Hillsborough County. On June 28, 1977 the court ordered that the plaintiff should present a full and detailed proposal of his plans for the removal of earth products from his land to the Selectmen. The plaintiff did prepare and submit such a report, but again was denied a permit.

A second hearing was held and an order issued requiring the Town and its Selectmen to present the plaintiff with a list of the specific areas of its concern and of any additional information required before the board would issue a permit. A set of forty-

seven (47) questions was presented to the plaintiff in September of 1977 with his response coming sometime during November of that year. This action apparently resulted in the offer of a permit to the plaintiff provided he comply with a number of conditions set out by the board. One such condition was that he dismiss the Hillsborough action. The plaintiff accepted these new requirements but also requested certain changes of his own. After waiting approximately four months to act on the plaintiff's requests the board agreed to amend the terms and conditions of the permit and set the effective dates of it to be from July 1, 1978 to June 30, 1979. The plaintiff agreed to the permit as amended but again requested that a change be made in the effective dates of the permit to read "date of issuance to one year later". The board apparently never acted on this requested change.

The plaintiff continued his attempt to come into compliance with the requirements of the board in order to obtain a permit throughout the early months of 1979. Finally in August of 1979 the board again offered the plaintiff a permit. Again a condition was that he withdraw his action pending in Hillsborough County Superior Court. The plaintiff refused to comply with this requirement and a permit was never issued.

After pursuing a permit over the course of five to six years, the plaintiff concluded he would not be able to obtain one and entered into negotiations to sell his property. He eventually entered into an agreement with defendant Manchester Redimix Concrete, Inc., and its President, Director and sole stockholder, Norman Bissonnette for the sale of his lands for a price of aproximately $217,000. Of this $217,000, one-half was paid up front while the remainder was to he paid over three years at six percent (6%) interest.

Memorandum, Opinion and Order

During the early part of 1980 the defendants, Bissonnette and Manchester Redimix applied for and were granted a permit to remove sand and gravel from the property in question. Said defendants have never made any commercial sales of sand or gravel from the New Boston property and estimate that no more than 10,000 cubic yards of sand and gravel have been removed from the property since 1980.

The plaintiff filed this action in April, 1983 asserting jurisdiction based on 28 U.S.C. §1331, federal question and 28 U.S.C. §1343, civil rights actions, as well as under the theory of pendant jurisdiction. In essence, the plaintiff's nineteen counts allege: (1) a conspiracy to deprive and a deprivation of his constitutional rights; (2) several counts sounding in state law alleging malicious use of judicial process, infliction of emotional distress, inverse condemnation and interference with advantageous business relations; (3) conspiracy to violate and violation of the Sherman, 15 U.S.C. §1, and Clayton, 15 U.S.C. §15 Acts; and (4) conspiracy to violate and violation of the RICO Act, 18 U.S.C. §1961 et seq.

Despite the numerous allegations and protestations of the plaintiff the court finds nothing in the voluminous material before it to distinguish this action from that of the typical land developer's claim under state law. The plaintiff asserted his right to appeal the actions of the Board of Selectmen as far back as 1974 when he initiated the Hillsborough County Superior Court action. He, however, saw fit to sit on his rights apparently never pursuing that action to a final judgment and nevertheless never seeking the appropriate judicial review in the New Hampshire Supreme Court. He has seen fit however to reassert his claims in the federal forum attempting to cull a federal case from what on its face would be apposite to state relief if anything. The plaintiff has

repeatedly taken random stabs at the federal constitution and statutes with a shotgun approach in an attempt to raise a federal action. The fact that he has asserted some nineteen counts against the defendants renders little aid to his plight for "[it] is the nature of the allegations, not their quantity, which is significant". *Cloutier v. Town of Epping,* 714 F.2d 1184, 1191 (1st Cir. 1983). The plaintiff's efforts to raise a claim here are patently defective and frivolous and have done little more than to occupy an inordinate amount of the court's time, to impose undue burdens on the defendants and to adversely effect a small New Hampshire town of 1,500 people in untold and untoward ways.

Some general observations before the court proceeds are appropriate at this time. On analyzing each of the plaintiff's claims the court finds it convenient to address them generally as to all defendants where possible. Though all counts are not addressed to each defendant or group of defendants the excessive nature of the complaints and the numerous claims make such an analysis necessary. Faced with the substantial task of addressing some twenty-three pending motions, the court recognizes that many of these motions will he rendered moot by this order and therefore need not be addressed individually. Furthermore, several of the motions raise the same issues by different groups of defendants and therefore may be addressed together. The Federal Rules of Civil Procedure call for "a short and plain statement" of the grounds upon which the court's jurisdiction rests and grounds upon which the pleader is entitled to relief. Fed. R. Civ. P. 8(a). Plaintiff's discursive amended complaint of eighty-five (85) pages, pushes to the apogee the mandates of this rule. See, *Ausherman v. Stump,* 643 F.2d 715 (10th Cir. 1981) (complaint consisting of 63 pages, with nine pages of attachments, violated rule requiring that complaint be a short and plain statement). Despite such the court has given consideration to the plaintiff's claims and

allegations and finds no viable grounds upon which plaintiff could assert a federal claim on the facts presented.

The First Circuit has been faced with several cases similar to this over the past two years. *Cloutier v. Town of Epping,* 714 F.2d 1184 (1st Cir. 1983); *Chiplin Enterprises, Inc. v. City of Lebanon,* 712 F.2d 1524 (1st Cir. 1983); *Roy v. City of Augusta,* 712 F.2d, 1517 (1st Cir. 1983). *Sucesion Suatez v. Geldhert,* 701 F.2d 231 (1st Cir. 1983). *Creative Environments v. Estabrook,* 680 F.2d 822 (1st Cir.), cert denied, 51 U.S.L.W. 3363 (Nov. 8, 1982). In these cases the court has clearly established that the "run of the mill land use or zoning dispute" will not raise a federal question absent some additional elements. Despite the plaintiff's repeated assertions to the contrary, the court finds that these cases are apposite and control the present action, supporting a dismissal.

These cases have been repeatedly cited and applied by the several defendants while the plaintiff has failed to adequately distinguish the cases. He summarily dismisses them as inapposite and attempts to base his rights on the fact that the court in those cases did in fact recognize that under certain conditions a genuine constitutional issue could be raised in cases of this sort. See, *Chitlin Enterprises, Inc. v. City of Lebanon,* 712 F.2d 1524, 1527 (1st Cir. 1983). (To be sure, additional factors might give rise to genuine constitutional issues in cases of this sort). This however was not intended to be a blanket recognition of the merits of any land use zoning case which alleged constitutional claims in addition to the traditional state claims inherent in such actions. To the contrary, this recognition is seen more as a tocsin flag, warning potential plaintiffs that in order to maintain a federal claim on such a dispute the facts presented must raise a substantial federal question before the court will be willing to recognize a federal right. The plaintiff also asserts that these cases were decided only

after exhaustive discovery had taken place and therefore, are inapplicable to the present suit in which discovery has yet to go forward. A precondition to a motion under Rule 12(b) or Rule 56 of the Federal Rules of Civil Procedure is not that discovery has been completed. In any event such a distinction will not render these cases inapplicable here. Had the plaintiff raised a valid federal claim, his action would have been allowed to go forward in this court. However, he has merely taken random stabs at establishing a constitutional claim and has presented nothing but mere allegations to support his claim, thus failing to put forth any federal claim.

The plaintiff contends that the defendants conspired together to deprive him of his property by denying him a permit, forcing him to go through extended legal battles and then to ultimately force him to sell his land to a potential competitor for a price substantially below the properties market value. All of the plaintiff's allegations stem from the proceedings surrounding his attempt to obtain a permit, from his application to the Board of Selectmen through at least two public hearings and ultimately to the Hillsborough County Superior Court where again at least two hearings were held. His claim therefore effectively asks this court to sit as a zoning board of appeals to determine whether he was entitled to a permit and if so to find that there were repeated violations of his rights during the denial process. This court clearly, should not sit as a zoning board of appeals. *Creative Environments v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982), quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (Marshall, J. dissenting).

Memorandum, Opinion and Order

42 U.S.C. §1983 Claims

The main question raised by the plaintiff's complaint is whether or not he has raised a claim under 42 U.S.C. §1983. Without going into an extended discussion of the merits and requirements of sustaining such a claim it is sufficient to say here that under the teachings of the above cited cases, absent a legitimate federal claim the plaintiff has failed to raise a § 1983 claim.

> *Every* appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983.

Cloutier v. Town of Epping, 714 F.2d 1184, 1189 (1st Cir. 1983) quoting *Creative Environments v. Estabrook, supra* at 833. For the plaintiff's claim to be cognizable under section 1983 he must allege and ultimately prove that the defendants' actions were under the color of state law, that he was deprived of constitutionally protected property because of the defendants' actions and that the deprivation occurred without due process of law. *Roy v. Augusta,* 712 F.2d 1517, 1522 (1st Cir. 1982). *Parratt v. Taylor,* 451 U.S. 527, 536-537 (1981). There is little question that the defendants, Town of New Boston and its Selectmen could be shown to have acted under color of state law but the actions of the remaining defendants have not been shown to rise to a level of state action.

The basis of the plaintiff's action is that all of the named defendants, along with certain unnamed parties conspired to bring about the deprivation of his property. It is established law that private parties jointly engaged with state or local officials can be found to be acting under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). However in pleading a conspiracy, the plaintiff must do more than allege in a conclusory fashion that a conspiracy exists. Failure to do so violates the requirement of pleading a short and plain statement of the claim showing that the pleader is entitled to relief. *Cairo v. Skow*, 510 F. Supp. 201, 206 (E.D. Wis. 1981). General allegations of cooperation between private individuals and government agencies do not make out a claim of action taken under color of state law. Because the circumstances under which cooperation between the private individual and the government agency will rise to state action are unclear it is appropriate to require the relationship or nature of cooperation be pled in some detail. *Garlos v. Perse*, 628 F.2d 679, 685 (1st Cir. 1980).

> In an effort to control frivolous conspiracy suits under §1983, federal courts have come to insist that the complaint state with specificity the facts that, in the plaintiff's mind, show the existence and scope of the alleged conspiracy. It has long been the law in this and other circuits that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with references to material facts. *Dunn v. Gazzola*, 216 F.2d 709, 711 (1st Cir. 1954); *Kadar Corp. v. Milbury*, 549 F.2d 230 (1st Cir. 1977); *Fletcher v. Hook*, 446 F.2d 14 (3rd Cir. 1971); *Johnson v. Stone*, 268 F.2d 803 (7th Cir. 1959); *Ellingburg v. King*, 490

> F.2d 1270 (8th Cir. 1974); *Powell v. Jarvis,* 460 F.2d 551 (2d Cir. 1972).

Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977). The plaintiff's complaint and supporting affidavits here do nothing more than allege that the defendants' conspired together. He shows no evidence of a concerted plan nor an agreement by the defendants to work together to deprive plaintiff of his property. To the contrary, affidavits submitted by the several defendants all controvert the plaintiff's allegations. As to the non-governmental defendants, it is evident on this first point that a section 1983 action cannot survive.

With respect to those defendants whose actions can rise to the level of state action the court does not find that the plaintiff was deprived of his property because of their actions. "Property in the constitutional sense is not the physical thing itself but rather is the group of rights which the owner of the thing has with respect to it. (citation omitted). The term refers to a person's right to 'possess, use, enjoy and dispose of a thing and is not limited to the thing itself' ". (citation omitted). *Burrows v. City of Keene,* 121 N.H. 590, 597 (1981). The New Hampshire Supreme Court in *Burrows* did recognize that zoning ordinances and other land-use restrictions could destroy the use and enjoyment of property but went on to state that not every regulation of private property through police power constituted a taking.

> . . . Reasonable regulations that prevent an owner from using his land in such a way that it causes injury to others or deprives them of the reasonable use of their land may not require compensation. See *Penn Central Trans. Co. v. New York City,* 438 U.S. at 144-45. (Renquist, J., dissenting)

> (quoting *Mugler v. Kansas,* 123 U.S. 623, 668-69 (1887)); *Sibson v. State,* 115 N.H. at 128, 336 A.2d at 242. Nor do reasonable zoning regulations which restrict economic uses of property to different zones and which do not substantially destory the value of an individual piece of property effect a taking requiring compensation.

Burrows v. City of Keene, supra at 598.

The New Hampshire court has also held that zoning ordinances may constitutionally prohibit the excavation of gravel.

> A zoning ordinance may constitutionally prohibit the excavation of gravel and there is no public taking, unless the prohibition deprives the owner of the only use of his land. (Citation omitted). Although there have been no gravel cases in New Hampshire, our consistent recognition of the broad scope of zoning authority clearly supports the validity of such a restriction.

Flanagan v. Hollis, 112 N.H. 222, 223 (1972). The zoning ordinance used here to deny the plaintiff his sand and gravel permit is recognized as constitutional and any claim that the plaintiff raises as to an arbitrary or unreasonable denial of his right raises state constitutional questions and not a section 1983 action.

DUE PROCESS AND EQUAL PROTECTION

Finally, as to the plaintiff's section 1983 claim but more importantly as to his claims of denial of due process and equal protection the court finds no facts supporting or issues to be tried

as to the due process claim. The due process clause of the 14th Amendment requires the state provide individuals with procedural protections when they are deprived of their property or liberty. *Cloutier v. Town of Epping,* 714 F.2d 1184, 1191 (1st Cir. 1983). The type of protection required depends upon the particular situation and as the court found in *Cloutier,* even if the plaintiff had a property interest here he was given all the procedural protections the Constitution requires.

The plaintiff received at least two public hearings on his application and after receipt of his denial notice was entitled to an appeal to state court where again at least two hearings were held. These procedures were adequate. "Full judicial-type hearings are not required when local boards engage in the quasi-legislative task of granting or revoking zoning or similar types of permits." *Cloutier v. Town of Epping, supra* at 1191. Therefore the informal type hearings offered by the town coupled with state judicial review served adequately to protect the plaintiff's due process rights. *O'Neill v. Town of Nantucket,* 711 F.2d 469 (1st Cir. 1983). The only possible defect in due process protection which could be raised was a result of the plaintiff's own neglect in failing to pursue to a conclusion his action in state court and therefore is not attributable to any of these defendants.

42 U.S.C. §1985(3)

The plaintiff also asserts liability based on 42 U.S.C. § 1985(3) claiming that the defendants conspired to deprive him of his rights, priviliges and immunities. Fundamental to establishing a claim under this section is some racial or class-based discriminatory animus.

> The language of §1985(3) requiring intent to deprive of equal protection or equal privileges or immunities, means that there must be some racial or perhaps otherwise class-based insidiously discriminatory animus behind the conspirators' action.

Thompson v. Sanborn, 568 Supp. 385, 388 (D.N.H. 1983) quoting *Griffith v. Breckenridge,* 403 U.S. 88 (1970).

Plaintiff has never alleged nor raised any facts to support a claim that the transgressions, against him were motivated by either race or class. Construing the pleadings in a light most favorable to the plaintiff the court recognizes that at one point he alleges the actions taken against him were due to his political and economic disadvantage in the Town. Such a claim is not of a type sufficient to support a class based animus under section 1985(3). "[T]he complaint must allege facts showing that the defendants conspired against the plaintiffs because of their membership in a class and that the criteria defining the class were invidious." *Creative Environments v. Estabrook,* 834, *supra* quoting *Harrison v. Brooks,* 519 F.2d 1358 1360 (1st Cir. 1975). Such allegations are lacking in the amended complaint and on the facts.

42 U.S.C. §1981

Similar to his section 1985(3) claims the plaintiff's claims under 42 U.S.C. §1981 must be dismissed for failure to allege racial discrimination. *Kermit Construction Corp. v. Banco Credito v. Ahorro Ponceno,* 547 F.2d 1, 3 (1st Cir. 1976). The plaintiff himself has recognized the need to allege racial discrimination,

and his failure to do so. In a memorandum submitted to this court on November 18, 1983 he stated,

> Defendants first new contention contained in paragraph number 5, that a claim under 42 USC, Section 1981 must allege racial discrimination, would be correct except for the fact that plaintiff has simply made a typographical error in citing the code section number.

He continues on in that memorandum to assert that his intent was to raise a claim under 42 U.S.C. §1986 and not §1981. Recognizing that plaintiff's statement in his memorandum is insufficient to so amend his complaint, and that a subsequent motion to amend which was apparently intended to amend his amended complaint in this way was defective, the court nevertheless notes that even if the amendment was allowed the plaintiff has still failed to state a claim under section 1986. Having previously found that the plaintiff has failed to state a claim under section 1985, any interrelated claim under section 1986 must also fall. *Kermit Construction Corp. v. Banco Credito Y Ahorro Ionceno, supra. Dowsey v. Wilkins,* 467 F.2d 1011 (5th Cir. 1972) (failure to establish any right to relief under section 1985 justified dismissal of an interrelated and dependent cause of action under section 1986). Therefore, plaintiff's claims as to section 1981 or 1986 must be dismissed.

UN-NAMED CONSPIRATORS

The plaintiff in his amended complaint and in several of his documents filed subsequent to it refers to "various corporations and/or individuals named and unnamed and not named as defendants in the action". (amended complaint at 4). Reading

the record before the court, it is difficult to determine whether he is asserting an action against these parties or not. However, to the extent that the plaintiff is attempting an action against such persons, the court dismisses the claims for lack of personal jurisdiction.

> As of the time the court acted on the motions to dismiss by the named defendants, the "unknown" defendants had not been identified or served. It was therefore open to the district court to dismiss the complaint as to the "unknown" defendants for lack of personal jurisdiction.

Glaros v. Perse, 628 F.2d 679, 685 (1st Cir. 1980).

FIRST AMENDMENT

The plaintiff has also raised, though somewhat belatedly, a First Amendment claim to the effect that he was denied his first amendment protection when the defendant Selectmen conditioned the issuance of his permit on his dropping his Hillsborough County action. The court is perplexed by such a claim and again can only see it as a frivolous attempt to raise federal jurisdiction. Despite the recognition of litigation as a protected First Amendment right, *In Re Primus,* 436 U.S. 412, 431 (1978) *In Re Halpin,* 598 F.2d 176, 187 (D.C. Cir. 1978), the court finds nothing to support a claim that those rights were deprived here. Even the shabbiest of lawyering practice requires that in settling a suit you bargain to have any pending actions dropped. This is a fundamental tool of negotiation but somehow the plaintiff feels not. Even if the court were to accept the plaintiff's argument there is no support for it. By refusing to accept the permit under the proposed terms, the plaintiff still had his

action in state court which sought a declaratory judgment and appeal of his denial of a rehearing on his permit application. Pursuit of this action to its conclusion would have finally determined the plaintiff's rights to the permit. Accepting the permit and dropping the suit would have likewise done so. How such actions could raise a First Amendment claim, this court is pressed to understand.

ANTITRUST CLAIMS

The most difficult of the plaintiff's claims to comprehend are those relative to the Sherman, Clayton and RICO Acts. Without doubt these claims are asserted in an attempt to raise federal jurisdiction and are the fruits of the plaintiff's fishing trip through federal law in an attempt to establish such jurisdiction.

It is well settled law that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hospital Bldg. Co. v. Rex Hospital Trustees,* 425 U.S. 738, 746 (1976). *Creative Environments v. Estabrook, supra* at 680. It is also true that summary proceedings should be used sparingly in complex antitrust litigation. *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962). This policy however is not a warrant for every plaintiff who can artfully draft an antitrust complaint, no matter how groundless or improbable, to be entitled to get to the jury. *Morrison v. Nissan Co., Ltd.,* 601 F.2d 139, 142 (4th Cir. 1979). *Searer v. West Michigan Telecasters Inc.,* 381 F. Supp. 634, 643 (W.D.Mich. 1974).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Fed. R. Civ. P. 56 (e).
>
> To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of anti-trust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289-290, 88 S. Ct. 1575, 1593, 10 L.Ed.2d 569 (1968).

Searer v. West Michigan Telecasters, Inc., supra, at 643.

The plaintiff's interstate commerce allegations are nothing more than vague, broad, conclusory claims that somehow the

denial of his permit prohibited him from selling his sand and gravel and ultimately his leveled property to out of state parties and thus affected interstate commerce. His claims are dismissible on this ground alone. *Cardio-Medical Assoc. v. Crozer-Chester Med. Ct.*, 536 F. Supp. 1065 (E.D. Pa. 1982). While the plaintiff is entitled to all favorable inferences supported by the record he is "not entitled to build [his] case on the gossamer threads of whimsy, speculation and conjecture". *White v. Hearst Corp.*, 669 F.2d 14, 19 (1st Cir. 1982) quoting *Managanaro v. Delaval Separator Co.*, 309 F.2d 389, 393 (1st Cir. 1962). This is precisely what he has attempted to do here.

Plaintiff's claims of interstate commerce involvement here revolve around five points. Initially, he asserts that his property contained high quality sand and gravel which was appropriate for use by New Hampshire in the construction of interstate highways which would be used for the movement of interstate commerce. The Supreme Court has specifically held however that the full range of antitrust laws do not apply to "persons who, as part of their local business, supply materials used in construction of local segments of interstate roads". *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 (1974). Secondly, he asserts that he spoke with out of state parties who expressed interest in buying his sand and gravel and also that once his land was leveled the property would be available again to out of state buyers for residential or commercial purposes. Such claims are based on mere speculation that future sales to out of state buyers would occur. Speculation cannot support an antitrust claim. Additionally, uncontradicted affidavits submitted by officers of defendant Manchester Redimix show that it was economic ally unfeasible for it to engage in the interstate sale of cement products. Thirdly, he appears to be asserting grounds in his affidavit that he was involved in certain logging operations involving interstate

commerce when he sought his permit and thereby expanding his business into the sand and gravel business he necessarily implicated interstate commerce. Again, the court finds nothing to support his claim that his prior activities implicate interstate commerce which was substantially or adversely effected by the defendants' activities.

The final antitrust arguments are that the defendant, Manchester Redimix was engaged in interstate commerce when it purchased the property and that by keeping plaintiff's sand and gravel off the market for six years, the defendants' actions effectively resulted in price fixing. As to the former, affidavits submitted by Manchester Redimix show that all their business is performed in New Hampshire and that all the sand and gravel they purchase comes from New Hampshire pits. The plaintiff has submitted nothing to contradict these claims or to raise doubt as to them. As to the latter, the court is once again in a quandry to find any merit in, or support for the claim. At the time in question the plaintiff has stated that a number of gravel operations were active in New Boston and the defendant's affidavits state that it has not removed any sands or gravel from the property for its operations and continues to purchase all its materials from New Hampshire pits. Again, the plaintiff has submitted nothing but his blind assertions and allegations to counter the defendants supported motions.

Having thoroughly considered the factual showing supporting the plaintiff's claims and those supporting the defendants' motions in a light most favorable to the plaintiff, it is clear that the plaintiff has raised paltry, insubstantial interstate commerce allegations and thus jurisdiction cannot be sustained as to those counts based on such. *Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr.*, 536 F. Supp. 1065 (E.D. Pa. 1982); *Searer v. West Michigan Telecasters, Inc.*, 381 F. Supp. 634 (W.D. Mich. 1974).

In sum, the court finds that the plaintiff's amended complaint fails to meet even the most minimal standards for properly pleading a cause of action under the antitrust laws. His claims are nothing more than broad, vague, conclusory allegations based solely on speculation. The plaintiff's claims fail to allege any legally relevant channel of interstate commerce or any substantial effect on it. He has failed to respond to the defendants' supported motions and thus summary judgment is appropriate.

RICO CLAIMS

The plaintiff does himself one better in raising seven outrageous accounts under the Racketeer Influenced and Corrupt Organization Act 18 U.S.C. §1964(c). He bases these counts on the same factual allegations found in his initial thirteen counts. Again, he is asserting interstate commerce claims based on broad, vague and conclusory claims. As discussed above, the interstate activity alleged hasn't been supported and at best is based on mere speculation. Likewise, his claims that every time the Town required him to drop his state suit in order to obtain a permit amounted to extortion is hardly an illegal act as contemplated by RICO. Finally, he has failed to allege the fundamental elements required to support a RICO claim under 18 U.S.C. §1962(c).

> The provisions of Section 1962(c) require two separate elements in addition to the elements of causality and an underlying pattern of racketeering activity. There must be an enterprise and there must be some nexus between the pattern of racketeering activity and the enterprise. In *United States v. Turkette,* 452 U.S. 576, 583, 101 S. Ct. 2524, 2528, 69 L. Ed. 2d 246 (1980), the Supreme Court stated that:

> "The enterprise" is not "the pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the government.

Thus, the enterprise must have a separate economic existence form the pattern of racketeering activity. *Bennett v. Berg,* 685 F.2d 1053, 1060 (8th Cir. 1982). The test for the essential relationship is defined in *United States v. Scotto,* 641 F.2d 47, 54 (2d Cir. 1980), cert. denied, 452 U.S. 961, 101 S. Ct. 3109, 69 L.Ed. 2d 971 (1981);

> One conducts the activities of an enterprise through a pattern of racketeering activity when (1) one is enabled to commit the predicate offenses *solely* by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise. [Emphasis added].

The plaintiff's RICO claims, as with all of his claims, are nothing more than a continued attempt to raise federal jurisdiction and to avail himself of the treble damage provisions of the act. 18 U.S.C. §1964(c). A long dissertation on the intent and requirements of the statute in civil suits will do nothing but prolong this order. The amended complaint fails in the fundamental task

of establishing an enterprise and pattern of racketeering theory. When presented with supported motions for summary judgment, the plaintiff failed to counteract them and therefore the court can say with confidence that the plaintiff has raised no substantial questions and that there are no issues to be tried here. *Freeman v. Continental Gin Co.*, 381 F.2d 458, 469 (5th Cir. 1967).

STATE CLAIMS

Along with the federal claims addressed above, the plaintiff asserted a number of counts based on state and local law. Federal courts have the power to entertain pendent state claims if the federal and state claims "derive from a common nucleus of operative facts" such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding". *United Mine Workers v. Gibbs*, 383 U.S. 715 725 (1966); *Rogins v. Bensalem Tp.*, 616 F.2d 680 697 (3rd Cir. 1980). However, where the federal claims have been dismissed before trial, the court is not obligated to retain the state claims. *Rosado v. Wyman*, 397 U.S. 397, 402-405 (1970). The court here refuses to exercise pendant jurisdiction over the state claims having found plaintiff's federal claims to be totally frivolous and unwarranted and sees no justification for delving into the state claims at this time.

CONCLUSION

The federal district court is not a forum for the redress of wrongs brought upon one by his own negligence, inaction or neglect. Plaintiff's alleged damages on the record presented have apparently occurred due solely to his own actions. He put great effort into obtaining a sand and gravel permit from the Town of New Boston only to refuse it when offered and then to totally abandon his effort before exhausting all his remedies. By his own

statements, the action he brought in Hillsborough County has never been finally adjudicated. None of the federal claims raised here, no matter how frivolous, would have arisen if he had exhausted his state remedies.

Though rather lengthy and detailed at times this order in no way is meant to show a justification for the plaintiff's action here. Based on the controlling case law enunciated by the First Circuit over the past several years, the plaintiff's actions are clearly frivolous and without justification. Not only has he seen fit to go on a fishing expedition in an attempt to raise a federal claim, he has asserted a 90 million dollar suit against citizens of a small New Hampshire town based on an alleged conspiracy, where they simply asserted their constitutional right to engage in the rough and tumble of the democratic political process. *Cloutier v. Town of Epping,* 714 F.2d 1184, 1192 (1st Cir. 1983) (Note 8). Numerous filings have been made by all parties but the plaintiff has failed to raise or support any valid federal claim. In light of the foregoing, it is evident that the plaintiff's action was an abuse of process and an abuse of each of the many defendants.

For the above reasons and where matters beyond and outside the pleadings have been submitted and considered by the court, the court finds it appropriate that summary judgment be granted each and every defendant. The court has found no cognizable federal issues which justify prolonging this action or allowing it to reach a jury.

Additionally, this court makes the following order which might appear Draconian, but in view of the frivolous unfounded and reckless actions of both plaintiff and his counsel it mandates sanctions for the following reasons.

Plaintiff and more flagrantly his counsel with his alleged knowledge of the law have had the untoward effect and temerity of placing in jeopardy, with a chilling effect the right and privileges of private citizens to honestly participate in local government by expressing their democratic right to free speech on local issues and their private interests. Individual citizens'of New Boston, some in a representative capacity with at least limited immunity and without the onus of paying legal fees, others not so fortunate who at their own expense have had to retain legal counsel, were collectively sued.

The small in population, Town of New Boston has had to cope with a financial burden not only in plaintiff's litigation in this court, but also for the past many years in the State court on a case lacking any merit at least in this court.

Counsel has been put on notice as to the holdings of the First Circuit in *Cloutier v. Town of Epping, supra, Garlos v. Perse, supra* and the bellwether case of *Creative Environments v. Estabrook, supra,* but blithely ignored their tenets or holdings.

Reference is made to the following quote from the 1983 year-end Report on the judiciary by Warren E. Burger, Chief justice of the United States Supreme Court which is apposite to the facts and law of this case.

> The Supreme Court has recognized the need for imposing sanctions against attorneys who abuse court processes. For example, last Term in *Tatum v. Regents,* 103 S. Ct. 1450 (1983), the Court invoked its rules of procedure and ordered an appellant to pay damages to the other side for bringing a frivolous appeal.

Accordingly, the plaintiff and his counsel shall equally recompense all defendants for their expenses and reasonable attorneys fees. The issue of any disciplinary action against plaintiff's counsel is held in abeyance pending the final adjudication of this case by appeal or otherwise.

January 13, 1984

s/ Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

Thomas F. Sullivan, Esq.
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JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED FEBRUARY 7, 1985

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 84-1154

JOHN RASKIEWICZ,
Plaintiff-Appellant,

v.

THE TOWN OF NEW BOSTON, ET AL.,
Defendants, Appellee.

Entered: February 7, 1985

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The Judgment of the district court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

cc: Messrs. Kehoe, Nixon, Van Loan and Stark

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE DATED JANUARY 13, 1984

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 83-198-L

John Raskiewicz

v.

The Town of New Boston, et al.

J U D G M E N T

In accordance with the MEMORANDUM, OPINION AND ORDER dated January 13, 1984 by the Honorable Martin F. Loughlin, United States District Judge, judgment is hereby entered.

By the Court,

s/ William H. Barry, Jr.
Clerk

January 13, 1984

cc: Thomas F. Sullivan, Esq.
Vincent J. Nardi, II, Esq.
David L. Nixon, Esq.
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Supreme Court, U.S.
FILED
AUG 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-77 (2)

In The

Supreme Court of the United States

October Term, 1985

JOHN RASKIEWICZ,

Petitioner,

vs.

THE TOWN OF NEW BOSTON: MANCHESTER REDIMIX CONCRETE, INC.; *et al,*

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR RESPONDENTS MANCHESTER REDIMIX CONCRETE, INC. AND ITS PRESIDENT, NORMAN BISSONNETTE

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Citations i

Statement of the Case 1

Reasons for Denying the Writ 7

I. The petition for writ of certiorari should be denied because the decision of the Court of Appeals is not in conflict with decisions of other Federal Courts of Appeals or state courts of last resort nor does it conflict with applicable decisions of this Court or involve substantial or unresolved federal questions 7

II. The petition for writ of certiorari should be denied because the Court of Appeals did not decide any federal questions and dismissed the petitioner's claims on the ground that he had not offered any material facts in support of his claims. 11

Conclusion 14

TABLE OF CITATIONS

Cases Cited:

Butz v. Economu, 438 U.S. 478 (1978) 13

Cole v. Gray, 638 F. 2d 804 (C.A. 5, 1981), *cert. denied,* 454 U.S. 838 (1981) 13

Contents

Page

Creative Environments, Inc. v. Estabrook, 680 F. 2d 822 (C.A. 1, 1982), *cert. denied,* 459 U.S. 989 (1982)....9, 10

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968)..... 13

Winslow v. Holderness Planning Board, 125 N.H. 262, 48[illegible] A. 2d 114 (1984)..... 7, 8

Statutes Cited:

42 U.S.C. § 1981 4

42 U.S.C. § 1983 ..... 4, 9

42 U.S.C. § 1985 4

Rule Cited:

Supreme Court Rule 17.....7, 10

United States Constitution Cited:

Fourteenth Amendment..... 4

No. 85-77

In The

Supreme Court of the United States

October Term, 1985

JOHN RASKIEWICZ,

Petitioner,

vs.

THE TOWN OF NEW BOSTON: MANCHESTER REDIMIX CONCRETE, INC.; *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR RESPONDENTS MANCHESTER REDIMIX CONCRETE, INC. AND ITS PRESIDENT, NORMAN BISSONNETTE

STATEMENT OF THE CASE

In 1964, the petitioner purchased a parcel of undeveloped land in New Boston, New Hampshire for approximately $4,000 (A732).[1] In 1974, he applied to the respondent Town of New Boston [hereinafter "Town"], pursuant to its local ordinance, for a permit to remove gravel from his property. On May 2, 1974, in accordance with the provisions of the ordinance (A323), the Town Selectmen held a public hearing on the petitioner's

1. References to the record below shall refer to the appendix before the Court of Appeals and shall be cited as "A" followed by a page number. Citations to the District Court and Court of Appeals decisions below shall be from the appendix to the petition for writ of certiorari and shall be cited as "PA" followed by a page number.

application (A1222). A question was raised at the hearing about the location of a proposed driveway to the property; as a result, the Selectmen scheduled a second hearing for May 16, 1974 (A481, A1226-A1228).

At the request of the petitioner's counsel, the second public hearing was continued and rescheduled for June 6, 1974 (A1228-A1230). In the words of the petitioner himself, "at this second public hearing numerous objections concerning my permit application to remove the sand and gravel from my land were raised by the selectmen and a number of residents of the Town of New Boston as well as Selectman Nickerson of Goffstown" (A482). The petitioner alleges that he was unprepared for these objections and had not hired experts to refute them. *Ibid.* On June 13, 1974, the Selectmen denied the petitioner's application for a permit.

On August 8, 1974, the petitioner filed an action in state court against respondents Harold Strong, George Hawkins and Roland Sallada [hereinafter "Selectmen"] (A1256-A1261). The petitioner claimed that the Town's gravel removal ordinance was adopted in violation of New Hampshire law and amounted to an unconstitutional taking of his land without just compensation. Alternatively, he claimed that the actions of the Selectmen in denying a permit to him were "unreasonable and unlawful, arbitrary and capricious and contrary to the facts as stated" (A1260).

Hearings on the petitioner's state court action were conducted in the Hillsborough Superior Court in April 1976 (A788-A1252). The petitioner claims that one of the Selectmen made a statement to him and another witness at the time of these hearings to the effect that the petitioner would never receive a gravel permit from the Town (A489). On April 22, 1976, the Master who heard the case issued an order continuing the action on the grounds that,

"*the parties have agreed to further negotiate* and the petitioner will file a new application with the Town of New Boston for a permit to remove sand and gravel" (A278). (emphasis supplied).

Negotiations, however, were unsuccessful and the petitioner applied to the Hillsborough Superior Court for further hearings on the matter (A21-A22). On June 28, 1977, another hearing was conducted by the Master, as a result of which he issued an order "*to which there is no objection*" (A1279). (emphasis supplied). The order provided that the petitioner should submit a detailed proposal for his gravel removal operation to the Town, that the Town should respond stating its "specific areas of concern" and that, "if the Selectmen choose not to issue a permit, they shall specify the reasons for that decision" (A1280-A1283). The Master further provided that, "in the event that the parties are unable to reach an accord under this order, the recessed hearing shall be rescheduled upon the request of either party . . ." (A1282).

The petitioner did, in fact, submit a new proposal to the Town for a gravel permit. The Town then issued a list of environmental and other concerns to the petitioner and the petitioner in turn supplied information in response thereto (A23-A24). In 1978, the Town offered to issue the petitioner a gravel permit for his New Boston property, subject to certain terms and conditions. Among those conditions was a requirement that the petitioner dismiss his legal action against the Town in the Hillsborough Superior Court (A24). The petitioner agreed to the Town's conditions, but requested that certain other changes be made in the terms of the permit, particularly its effective date.

The petitioner and the Town continued to negotiate, albeit unsuccessfully, for several additional months (A25-A26). In July of 1979, the petitioner eventually notified the Hillsborough Superior Court that the parties again had been unable to reach agreement and requested a new hearing on his petition (A26-A27).

The state court apparently never acted on the petitioner's request, and he apparently did not pursue it.

In the summer of 1979, the petitioner retained a real estate broker to sell his New Boston land (A485). The petitioner's broker contacted respondent Manchester Redimix Concrete, Inc. [hereinafter "Redimix"] sometime that summer or fall (A409). Prior to that time, Redimix had had no involvement with the petitioner, his land or the Town (A408).

Redimix purchased the petitioner's property in 1979 for $217,000 (A29). According to the petitioner, this price was less than the then fair market value of his property. *Ibid.*; (A486-A487).

On March 20, 1980, a representative of Redimix attended a New Boston Selectmen's meeting "to be advised whether the Raskiewicz Gravel Removal Permit could be changed to the Manchester Redimix Co. as they are satisfied to work under the same regulations . . ." (A320). The required hearing was subsequently held by the Selectmen on Redimix's application and a permit was granted. The petitioner himself was present at the Selectmen's hearing (A487-488).

Three years later, the petitioner filed a civil action in the United States District Court for the District of New Hampshire against the Town, the Selectmen, Redimix and its president, and 28 individual citizens who had intervened in his state court action on the side of the Town. In 19 separate counts, stated and restated in 83 pages, the petitioner's amended complaint alleged a conspiracy among all of the respondents to deprive him of unspecified constitutional rights secured to him by the Fourteenth Amendment to the Constitution and 42 U.S.C. §§ 1981, 1983 and 1985, a conspiracy to prevent him from engaging in interstate commerce in violation of the Sherman Act and the Clayton Act, a conspiracy to commit extortion in violation of the so-called RICO

Act and a conspiracy to violate a myriad of state created rights. In each case, the gravamen of the petitioner's claim was that the respondents had conspired to deny him a permit to remove sand and gravel from his property in New Boston and that, as a result, he had been compelled to sell his property to Redimix for less than full value. The complaint prayed for $90 million in damages, plus interest, costs and attorneys' fees.

Redimix filed its answer to the amended complaint on August 15, 1983 and a subsequent amendment to its answer on September 15, 1983. In substance, Redimix denied the material allegations of the complaint and, in particular, that it was party to any conspiracy to deprive the petitioner of a gravel removal permit (A239-A251, A438-A441).

On September 13, 1983, Redimix filed a motion for summary judgment, supported by the affidavits of Peter Dowling and Norman Bissonnette, two of its corporate officers, and Joseph Millimet, Esquire, counsel to the corporation (A399-A410). The Town, the Selectmen and the Townspeople also filed motions for summary judgment, supported in each case by affidavits (A367-A380, A493-A544, A554-A558, A603-A604). The petitioner, in turn, objected to the motions of the various respondents and filed affidavits from himself and a Mr. Lars Ohman (A471-A490, A593-A597).

On December 2, 1983—just prior to the scheduled hearing on the respondents' dispositive motions—the petitioner filed a series of requests for admissions pursuant to Rule 36, Federal Rules of Civil Procedure (A545-A547). Responses to the petitioner's requests for admission were filed by Redimix and the Town on December 15, 1983 and December 16, 1983, respectively (A590-A592, A598-A602). (*See also*, A613-A615, A618-A620).

Prior to the hearing on the summary judgment motions, the Town had also responded to a request by the petitioner for production of documents by essentially turning over all of its files concerning the petitioner's application for a gravel removal permit and the ensuing state court litigation between the petitioner and the Town in the Hillsborough Superior Court (*See* A195-A198, A324-A326). Additionally, at the hearing held by the District Court on the respondents' motions, a copy of the transcripts of all testimony before the state court was also made a part of the federal record (A788-end).

The District Court held a hearing on December 16, 1983 on the respondents' motions for summary judgment (A693). No additional evidence was offered by the petitioner at that hearing, but counsel for the petitioner was given wide latitude to argue and make representations as to the petitioner's case and the matters which he expected to prove (*E.g.*, A731-A732, A734-A735).

On January 13, 1984, the District Court issued its memorandum, opinion and order granting all of the respondents' motions for summary judgment. In addition, the court found that the petitioner's complaint was "frivolous, unfounded and reckless" (PA41a). Accordingly, the court ordered the petitioner and his counsel to "equally recompense all defendants for their expenses and reasonable attorneys' fees" (PA43a).

The petitioner filed his notice of appeal to the First Circuit Court of Appeals on February 8, 1984 (A663). The petitioner had previously filed a motion to stay the imposition of costs and attorneys' fees pending appeal (A652). The District Court granted the petitioner's motion subject to the filing of a supersedeas bond in the amount of $10,000. The petitioner filed the required bond with the District Court on February 15, 1984.

On February 7, 1985 the Court of Appeals affirmed the District Court's grant of summary judgment in behalf of the

respondents. The court concluded its opinion by noting that, "The district court's conclusion that Raskiewicz's federal claims were 'totally frivolous and unwarranted' was completely justified" and itself ordered that the petitioner be taxed with double the costs of the appeal (PA17a).

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS OR STATE COURTS OF LAST RESORT NOR DOES IT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT OR INVOLVE SUBSTANTIAL OR UNRESOLVED FEDERAL QUESTIONS.

The petition for writ of certiorari does not even purport to be based upon considerations appropriate to the exercise of this Court's jurisdictions in such matters. *See generally*, Supreme Court Rule 17. There is no suggestion in the petition that the First Circuit decision below conflicts with the decisions of other courts of appeals or state courts of last resort in similar cases. In essence, the petition merely alleges that the First Circuit erred in affirming the action of the District Court in granting the respondents' motions for summary judgment.

To the extent that the petitioner relies upon *any* purported conflict among courts, he suggests that the First Circuit and/or District Court decisions failed to follow a decision of the New Hampshire Supreme Court on a matter of state law (Petition for Writ of Certiorari, p. 11-15). The New Hampshire case upon which the petitioner places such great emphasis is *Winslow v. Holderness*

Planning Board, 125 N.H. 262, 480 A. 2d 114 (1984). In that case, the New Hampshire Supreme Court held that the action of a municipal planning board in reviewing an application for land subdivision should be deemed to be quasi-judicial for purposes of applying a stricter state rule of administrative common law in deciding whether to disqualify a member of the board and in determining the effect of such a disqualification upon acts of the board in which the official had participated. Applying the rule to the facts of the case before it, the court held that a planning board member who had expressed support for the subdivision application before he became a member of the board was disqualified to act upon the application and that his participation in the approval of the application rendered the approval invalid.

The petitioner claims that his allegations of bias upon the part of the Selectmen were sufficient under the rationale of the *Winslow* case to cause the federal courts to grant him relief. Even assuming the existence of a conflict between the decision of the Court of Appeals[2] and the *Winslow* case, however, the petitioner has stated no adequate basis for the issuance of a writ of certiorari. In its citation of the New Hampshire Constitution, New Hampshire statutes and New Hampshire case law, the Supreme Court of New Hampshire made it clear in the *Winslow* case that its decision rested upon *state* law. *Id.* at 125 N.H. 267-268. Consequently, the petition presents no substantial *federal* question and the writ should be denied.[3]

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2. It is interesting to note that the District Court could hardly be chastised for not considering the *Winslow* case because the District Court issued its opinion in the case at bar on January 13, 1984, whereas the New Hampshire Supreme Court did not render its decision in *Winslow* until July 26, 1984.

3. The fact of the matter is that there is not a conflict between the decisions of the Court of Appeals and the District Court, on the one hand, and the New Hampshire Supreme Court in the *Winslow* case, on the other hand. The opinions of the two federal courts are devoid of any language which could be construed

(Cont'd)

There is nothing else in the petitioner's claims of due process denials that raises any substantial federal question. As the First Circuit noted, the "federal courts do not sit as a super zoning board or a zoning board of appeals" (PA13a). The fact that the petitioner alleges bias and prejudice upon the part of the municipal body which denied him his land use permit does not make his case unique or significant.

> *Every* appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough to simply give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under § 1983.

Creative Environments, Inc. v. Estabrook, 680 F. 2d 822, 833 (C.A. 1, 1982), *cert. denied,* 459 U.S. 989 (1982).

Likewise, the petitioner's claim that he did not receive adequate notice of the matters with which he would have to

---

(Cont'd)

to hold that an unsuccessful applicant for a gravel permit is not entitled to *any* judicial relief if he can show actual bias upon the part of a member of the administrative tribunal which denied him the permit. On the contrary, the Court of Appeals stated that, "where, *as here*, the state offers a panoply of administrative and judicial remedies, litigants may not ordinarily obtain federal court review of local zoning and planning disputes by means of 42 U.S.C. § 1983" (PA13a). (emphasis supplied). The court expressly did not reach the question of whether or not "sufficiently serious, supported, assertions of this type could make out a due process claim under Section 1983" (PA14a-PA15a). The holding of the court was that the issue was moot because the petitioner's pleadings and supporting affidavits failed to present a genuine issue of material fact supporting any such inference of actual bias (PA15a).

contend at the recessed hearing upon his permit application raises no issue of national import. Where the petitioner does not now challenge the constitutionality of the Town's gravel removal ordinance and does not claim that the State of New Hampshire would not afford him a remedy for his claim of inadequate notice, the petitioner raises no issue worthy of this Court's consideration. "The conventional planning dispute—at least where not tainted by fundamental procedural irregularities, racial animus, or the like—which takes place within the framework of an admittedly valid state . . . scheme is a matter primarily of concern to the state and does not implicate the Constitution." *Creative Environment v. Estabrook, supra* at 833.

Perhaps in recognition of the fact that his vague references to denials of "due process" and to a "taking" constitute no more than an exercise in labeling, the petitioner attempts to interest this Court in his case by showcasing his purported First Amendment claim. In summary, the petitioner claims that his constitutional right of access to the courts was infringed by the Town when, after years of litigation and negotiations, it agreed to issue him a gravel removal permit upon the condition that he withdraw his state court litigation. The petitioner himself acknowledges that this claim (which was not even made in his complaint and was only mildly asserted in the District Court and the Court of Appeals) was treated as "frivolous" by the lower courts (Petition for Writ of Certiorari, p. 10). The fact that the petitioner seeks to elevate its stature before this Court by devoting more space to it here than he did in any of his prior pleadings should not cause it to now be given any more consideration than it was below.

Simply stated, there is nothing in this petition which satisfies the requirements of Supreme Court Rule 17 or which would otherwise warrant this Court to exercise its discretion to issue a writ of certiorari. The petitioner's attempt to clothe his state

claims, if any, in federal garb and to attach a $90,000,000 price tag to the finished product is indeed frivolous.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DID NOT DECIDE ANY FEDERAL QUESTIONS AND DISMISSED THE PETITIONER'S CLAIMS ON THE GROUND THAT HE HAD NOT OFFERED ANY MATERIAL FACTS IN SUPPORT OF HIS CLAIMS.

The *sine qua non* of the petitioner's antitrust claim and of his federal civil rights claims against Redimix and the other non-governmental respondents was the existence of a conspiracy. The Court of Appeals expressly found that the petitioner had raised no material issue with respect to this essential element of his claims:

> Raskiewicz's inference of conspiracy, a necessary ingredient, also, of his anti-trust claim, is even less compelling. We are required to respect all inferences that reasonably can be drawn from the facts, but we cannot ignore uncontested facts that render inferences unreasonable or, in this case, fantastic. It is uncontested that Redimix had no involvement with the Town or Raskiewicz before Raskiewicz's agent contacted the company in the summer or fall of 1979. At that point in time, Raskiewicz had twice been offered a permit after extensive negotiations, had chosen not to accept them and, by his own admission, had given up his quest for a permit. The timing of Redimix's entry on the scene alone punctures the inference that the Board and Redimix conspired to deprive

> Raskiewicz of a permit during the years he sought one (1974-1979). Moreover, the fact that Redimix tried to accept the very permit offered Raskiewicz and eventually received a permit containing terms and conditions similar to those imposed on Raskiewicz dispells any inference of conspiracy or bias to be drawn from Bissonnette's confidence that he could secure a permit and the Board's prompt grant of a permit to Redimix. We therefore find no material issue as to either the Section 1983 or Sherman Act claims (PA16a-17a).

Similarly, with respect to the gravamen of the petitioner's federal civil rights claims—that he had been denied a permit because of the bias of the Selectmen—the Court of Appeals found that, "the record falls far short of creating a genuine issue of material fact with respect to such a claim" (PA15a). As the court stated:

> We see nothing that supports an inference of actual bias, let alone corruption. The Board's conduct in the application proceedings and state court action was not probative of illegal bias. Indeed, there is no indication that the Board's treatment of Raskiewicz was any different from the treatment accorded to other applicants. Further, any negative inference to be drawn from the purportedly "key" statement by [one of the Selectmen] that Raskiewicz would never be given a permit is completely negated by the fact that the Board did in fact offer Raskiewicz a permit although it was not required by the ordinance to do so (PA15a.)

This case, therefore, does not involve any rulings by the Court of Appeals on significant federal questions. The court merely

found that the petitioner's conclusory allegations were unsupported by any facts or reasonable inferences to be drawn from such facts.

The respondents' motions for summary judgment and supporting affidavits called upon the petitioner to come forth with facts in support of his claims. As this Court has noted in the antitrust context,

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action to be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968). The fact that a plaintiff alleges a violation of his federal civil rights does not alter this burden of pleading or proof. *Butz v. Economu*, 438 U.S. 478, 507-8 (1978) ("damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment").

The federal courts have been made particularly attractive to claimants by reason of the expansive remedies they offer in certain civil actions. The case at bar epitomizes the problem. The lure of treble damages in antitrust actions and attorneys' fees in civil rights actions apparently proved irresistible to the petitioner. In order to avail himself of the federal largesse, he conjured up a vision of conspiracy and bias through "murky allegations as to motive plus mere contact plus the fact of [the denial of his gravel permit] linked together by speculation and conclusory allegations." *Cole v. Gray*, 638 F. 2d 804, 811 (C.A. 5, 1981), *cert. denied*, 454 U.S. 838 (1981).

The Court of Appeals simply recognized the petitioner's allegations as being made solely to acquire federal jurisdiction and properly dismissed them for lack of factual substantiation. This Court should do likewise.

CONCLUSION

This case presents no substantial federal questions, involves no conflicts between the circuits and involves nothing more than the Court of Appeals affirming a dismissal on summary judgment for lack of any factual basis. The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 85-77

In The

Supreme Court of the United States

October Term, 1985

JOHN RASKIEWICZ,

Petitioner,

vs.

THE TOWN OF NEW BOSTON: MANCHESTER REDIMIX CONCRETE, INC.; *et al,*

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR RESPONDENT, PATRICIA L. (GETMAN) ANDREWS

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TABLE OF CONTENTS

Page

Statement of the Case 1

Reasons for Denying the Writ 6

I. The petition for writ of certiorari should be denied because the petitioner continues to demonstrate his bad faith, by misrepresenting the facts in his petition to this Court. 6

II. The petition for writ of certiorari should be denied because the decision of the United States Court of Appeals for the First Circuit is fully in conformance with decisions of this Court and does not involve substantial or unresolved federal questions. 8

Conclusion 9

TABLE OF CITATIONS

Cases Cited:

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 44 L. Ed. 2d 141, 95 S. Ct. 2157 (1974) 6

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978) 8

F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 40 L. Ed. 2d 703, 94 S. Ct. 2157 (1974) 6

Hughes v. Rowe, 449 U.S. 5, 101 S. Ct. 173, 60 L. Ed. 2d 163 (1980) 8

Contents

Page

Vaughn v. Atkenson, 369 U.S. 527, 8 L. Ed. 2d 88, 82 S. Ct. 997 (1962) 6

Statutes Cited:

NH RSA 31:41(b) 1

NH RSA 31:60 1

42 U.S.C. § 1983 8

Rules Cited:

Federal Rule of Procedure 12(b)(6) 4

Supreme Court Rule 17 9

Supreme Court Rule 19.6 6

United States Constitution Cited:

First Amendment 8

No. 85-77

In The

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR RESPONDENT, PATRICIA L. (GETMAN) ANDREWS

STATEMENT OF THE CASE

This action arose from an application made by the petitioner, John Raskiewicz, for a gravel permit from the Town of New Boston in 1974. Pursuant to State Statutes (NH RSA 31:60 and 31:41-b) the Town had, in 1972, passed an ordinance requiring a permit prior to the removal of earth products in the Town.

In 1964, the petitioner, John Raskiewicz, purchased the parcel of land, and in 1974 he applied to the Board of Selectmen with

the intent of procuring a permit under that Town Ordinance. After two public hearings were held on the petitioner's application for a permit, the Board denied his permit request on June 13, 1974. Thereafter, on August 12, 1974, the petitioner filed a petition for declaratory judgment in Hillsborough County Superior Court [Raskiewicz v. Strong, et al., No. E-1329 (A1256)].[1] In that petition, the petitioner challenged the constitutionality of the Town Ordinance; claimed that the denial by the Board of his permit request constituted a "taking of property for which just compensation was required;" and that the decision of the Board was "unreasonable and unlawful, arbitrary and capricious and contrary to the facts as stated." On October 26, 1974, the respondent, Patricia L. (Getman) Andrews, along with twenty-seven (27) other concerned residents of New Boston filed a motion to intervene in the declaratory judgment action in which they alleged *inter alia* that:

> John Raskiewicz's proposed operation of his gravel pit would be in violation of the Town Ordinance to Regulate Removal of Earth Products in that (a) the excavation necessitated by such operation will be detrimental to the welfare of the Town in terms of property values, historic or scenic character, and environmental quality, (b) such operation will endanger the public health and safety and constitute a nuisance through production of noise, dust, and other by-products seriously objectionable and detrimental to the normal use of adjacent property, (c) the earth removal necessitated by such operation will result in traffic

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1. All references to record below refer to appendix before Court of Appeals and are cited herein as "A" followed by a page number. Citations to petition of John Raskiewicz to this Court and appendices thereto are cited as "PA" followed by a page number.

> congestion and hazards and will result in undue injury to ways over which material is transported, and (d) when the operation is completed, John Raskiewicz will not establish the site so as to prevent erosion and the site will be detrimental to the welfare of the Town in terms of property values, historic or scenic character, and environmental quality (A1265).

Fifteen of those individuals moving to intervene alleged that they were "residents of New Boston who live nearby the Raskiewicz gravel operation," (A1267) and that "the proposed operation of John Raskiewicz's gravel pit would cause special damages . . . including depreciation in their property resulting, *inter alia* from the traffic flow occasioned by the Raskiewicz operation" (A1267). The other individuals moving to intervene stated that they were ". . . residents of New Boston who (were) concerned about the overall effect on the Town of New Boston of large-scale gravel operations" (A1267). All of the individuals moving to intervene alleged that ". . . the proposed operation of John Raskiewicz's gravel pit would cause special damages to the Town of New Boston, in that it would be detrimental to the health, safety, and welfare of the Town of New Boston and its residents . . . and would cause depreciation in the value of the property of the residents of the Town of New Boston" (A1267).

On May 8, 1975, the court, by order of Chief Justice Keller, granted the motions to intervene of nineteen (19) of those individuals requesting intervenor status (A1272, A1273). *The motion was denied with regard to the respondent, Patricia (Getman) Andrews, and eight others who requested intervenor status by motion of October 26, 1974. As of the date of the court order of May 8, 1975, Patricia (Getman) Andrews' involvement with this controversy ended.*

In June, 1983, however, Patricia (Getman) Andrews was named as one of the defendants in an 85-page complaint (A8) in which, despite the failure of Patricia L. (Getman) Andrews to successfully acquire intervenor status, it was alleged that she, during the period 1974 through 1980, illegally conspired to deny John Raskiewicz a permit and included nineteen counts alleging a wide variety of statutory, common law, and constitutional causes of action. On July 29, 1983, an answer was filed on behalf of Patricia L. (Getman) Andrews (A203). On August 3, 1983, a motion to dismiss on the statute of limitations was filed by Patricia L. (Getman) Andrews (A224). On August 19, 1983, her answer was amended to state the affirmative defense of the statute of limitations pursuant to the Federal Rules of Civil Procedure (A258). On September 14, 1983, the respondent filed a motion to join in the motion to dismiss by Herbert Elliot, Jr., Barbara Stewart, and Kathryn Kacharos, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the basis that she ". . . was not an intervenor as described by the plaintiff and (had) no involvement in the discovery proceedings or any other role in the litigation" (A436). This motion (of September 14, 1983) was granted by court order of September 30, 1983.

On December 8, 1983, a motion to dismiss was filed by Patricia L. (Getman) Andrews (A554), in which she argued that the petitioner, in a response received by respondent's counsel on September 12, 1983, to motion of defendants, Herbert G. Elliot, Barbara Stewart, and Kathryn Kacharos, to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), had said that he was agreeable to dismissing all actions against those intervenors who did not file affidavits to intervene and who were not listed as intervenors by the ruling of the Hillsborough County Superior Court, and that since she had not been granted intervenor status, the action against her should be dismissed (A780). Attached to the motion of December 8, 1983, was an affidavit of Patricia L. (Getman) Andrews in which she attested to the fact that she

was never granted intervenor status in the case of *John Raskiewicz v. Harold Strong, et al.* (A557).

On December 16, 1983, a hearing was held in which eight (8) motions to dismiss, four (4) motions for summary judgment, and eleven (11) other motions then pending before the court were considered (A693). By order dated January 13, 1984 (A621) the court found the petitioner's ". . . federal claims to be totally frivolous and unwarranted" (A647), and stated that ". . . the plaintiff's action was an abuse of process and an abuse of each of the many defendants" (A648). Consequently, the court granted summary judgment in favor of each and every defendant (A648). In addition, the court ordered the petitioner and his counsel to equally recompense all of the defendants for their expenses and reasonable attorney's fees (A650).

On February 8, 1984, the petitioner filed a notice of appeal to the First Circuit Court of Appeals, which affirmed the district court's grant of summary judgment on behalf of the respondents on February 7, 1985. While the petitioner states that his appeal "did not include federal claims against the townspeople (intervenors), only New Hampshire state law claims which Raskiewicz contends the district court should have heard as pendent claims" (PA5, footnote 2), the petitioner continued to assert that there was sufficient evidence on the record to support claims against Patricia L. (Getman) Andrews arguing that his allegations of bias and conspiracy against Andrews were tied to those against the Town and Redimix and involved the same set of operative facts.

In its affirmance, the First Circuit found the district court to be completely justified in its conclusion "that Raskiewicz's federal claims were totally frivolous and unwarranted" (PA17a). The court also held that the appeal itself was of a frivolous nature and ordered that the petitioner be taxed with double costs (PA17a).

REASONS FOR DENYING THE WRIT

I.

The petition for writ of certiorari should be denied because the petitioner continues to demonstrate his bad faith, by misrepresenting the facts in his petition to this Court.

In his petition for writ of certiorari to this Court, the petitioner has demonstrated his continued bad faith by misrepresenting his case against "intervenors" who were named as parties in this action in the United States District Court for the District of New Hampshire as being against ". . . several of the individual townspeople who had been granted 'intervenor' status in the state proceeding" (PA5). Such is clearly not the case with respect to Patricia (Getman) Andrews who was denied intervenor status in the superior court action (A1271, A1273). While the petitioner did not list Ms. Andrews in his petition under the "Parties to the Proceeding" (PAiii), pursuant to Supreme Court Rule 19.6, all parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties to petition for writ of certiorari. The failure of the petitioner to fully and accurately described the individual townspeople, including the respondent, Patricia L. (Getman) Andrews, only highlights the justification of the district court for imposing sanctions against the petitioner.

This Court has held that federal courts have broad statutory and inherent power to assess attorneys fees in an action ". . . when the losing party has acted in bad faith, vexatiously, wantonly, or for aggressive reasons. . ." *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 260, 44 L. Ed. 2d 141, 154, 95 S. Ct. 1612 (1975), quoting *F. D. Rich Co. v. Industrial Lumber Co.,* 417 U.S. 116, 129, 40 L. Ed. 2d 703, 714, 94 S. Ct. 2157 (1974), *citing Vaughn v. Atkenson,* 369 U.S. 527, 8 L. Ed. 2d 88, 82 S. Ct. 997 (1962). Here the district court had ample justification to

support an award of attorney fees in favor of the respondent in light of the patently irresponsible action of the petitioner in bringing action against her for merely attempting to assert her ". . . constitutional right to engage in the rough and tumble of the democratic process" (A28). While she was unsuccessful in her attempt to become a party to the Superior Court action, she was nonetheless caused to suffer the burden of defending against a ninety million ($90,000,000) dollar lawsuit in which she was the victim of such groundless and unsubstantiated charges as intentional infliction of emotional distress (A53), fraud (A54), negligent infliction of emotional distress (A54), inverse condemnation of petitioner's real property (A55), interference with advantageous business relationship/advantage (A57), conspiracy to violate the Sherman Act (A59), violation of the Clayton Act (A63) and six counts of violation of the RICO Act (A67-A93). While other unsubstantiated allegations were made against the respondent, Patricia (Getman) Andrews, these demonstrate the gross recklessness of the petitioner's action.

While the attorney for the petitioner on December 5, 1983, did agree to drop his action against the respondent that agreement was contingent upon his being given a frank, off-the-record discussion with her by which the petitioner's attorney hoped to find out what ". . . the townspeople were really doing in the case" (A781). The attorney for the petitioner during the lunch break during the hearing of December 16, 1983, continued to apply the condition to any release of Patricia L. (Getman) Andrews, and when questioned by the court concerning this, the attorney for the petitioner declined to deny his actions stating that "[P]erhaps Mrs. Getman Andrews is more involved than her attorney realizes" (A784). Such an extortionistic practice by the petitioner's attorney is only another example of the clear justification that the district court had for granting attorney fees in favor of the petitioner. The respondent, who was forced to incur thousands of dollars in legal fees in the district court proceedings (A681-A692) continues to be forced to incur substantial amounts in responding here.

II.

The petition for writ of certiorari should be denied because the decision of the United States Court of Appeals for the First Circuit is fully in conformance with decisions of this Court and does not involve substantial or unresolved federal questions.

The major basis set forth by the petitioner for the writ of certiorari to this Court appears to be that the district court violated the petitioner's due process and First Amendment rights by entering sanctions against him and his counsel pursuant to the entry of summary judgment in favor of the respondents.

Not only did the district court act within the appropriate scope of discretion in awarding attorney fees under the inherent power of the court to do so where the losing party is found to have acted in bad faith, but such action was also appropriate under 42 U.S.C. § 1983 inasmuch as this was a situation where the ". . . plaintiff's action was frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 54 L. Ed. 2d 648, 657, 98 S. Ct. 694, 701 (1978). Even without a finding of the subjective bad faith element, the Supreme Court has held that attorney fees can be awarded in appropriate circumstances in groundless and meritless action such as this. *Id.* The holding of this Court in *Christiansburg Garment Co., supra,* was more recently affirmed in *Hughes v. Rowe,* 449 U.S. 5, 14-15, 101 S. Ct. 173, 178-179, 60 L. Ed. 2d 163, 173 (1980).

CONCLUSION

No basis exists under Supreme Court Rule 17 for this Court to issue a writ of certiorari in this case. Not only was the district court's exercise of discretion in sanctioning the petitioner and his counsel for their bad faith in the underlying action fully in line with decisions of this Court, but the petitioner even now continues to demonstrate that same bad faith in his petition to this Court. For these reasons, the respondent, Patricia L. (Getman) Andrews, requests that this Court deny the petition for writ of certiorari.

Respectfully submitted

/s/ _____

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Supreme Court, U.S.
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TABLE OF CONTENTS

Pages

Table of Contents i

Table of Citations ii

Statement of the Case 1

Reasons for Denying the Writ:

I. The Petition For Writ Of Certiorari Should Be Denied Because It Presents No Reasons Of The Type Specified In Supreme Court Rule 17 Which Merit This Court's Review; Because It Fails To Present The Facts And Issues In An Accurate And Clear Fashion; And Because There Is No Showing That The Concurrent Findings Of Both Courts Below That The Case Raises No Genuine Issues Of Material Fact Sufficient To Support A Judgment For Petitioner Were Erroneous. 5

Conclusion 12

TABLE OF CITATIONS

Pages

CASES CITED:

Agins v. Tiburon, 447 U.S. 255, 260 (1980) 9

Butz v. Economou, 438 U.S. 478, 507-508 (1978) 6

City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 677 (1976) 8

Corrigan v. Buckley, 271 U.S. 323 (1926) 7

Creative Environments v. Estabrook, 680 F.2d 822, 832 *n.* 9 (1st Cir. 1982) 8

Duignan v. U.S., 274 U.S. 195 (1927) 7

Flanagan v. Town of Hollis, 112 N.H. 222, 293 A. 2d 328 (1972) 2

Goldblatt v. Hempstead, 369 U.S. 590 (1962) 9

Harlow v. Fitzgerald, 457 U.S. 800, 814-819 (1982) 6

Hudson v. Palmer, — U.S. —, 104 S. Ct. 3194 (1984) 8

Ingraham v. Wright, 430 U.S. 651 (1977) 8

Kirby Forest Industries, Inc. v. U.S., — U.S. —, 104 S. Ct. 2187 (1984) 9

Mathews v. Eldridge, 424 U.S. 319, 334 (1976) 7

Parratt v. Taylor, 451 U.S. 527, 542 (1981) 8

Shelley v. Kraemer, 334 U.S. 1 (1948) 7

Southern Power Co. v. Public Service Co., 263 U.S. 508 (1924) 6

Virtue v. Creamery Package Mfg. Co., 227 U.S. 8 (1913) 7

Winslow v. Town of Holderness Planning Board, — N.H. —, 408 A.2d 114 (1984) 8

TABLE OF AUTHORITIES—Continued

Pages

STATUTES CITED:

42 U.S.C. § 1983 2
15 U.S.C. § 1 2

RULES CITED:

Supreme Court Rule 17 ..... 2, 4, 5, 12
Supreme Court Rule 21.5 ..... 4, 5, 12

UNITED STATES CONSTITUTION CITED:

First Amendment 3, 7, 10
Fifth Amendment 6, 7, 9
Fourteenth Amendment 6, 7

No. 85-77

In The

Supreme Court of the United States

October Term, 1985

JOHN RASKIEWICZ,

Petitioner,

vs.

THE TOWN OF NEW BOSTON, MANCHESTER REDIMIX CONCRETE, INC., et al,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR RESPONDENTS, THE TOWN OF NEW BOSTON, ROLAND SALLADA, HAROLD STRONG, THOMAS MANSFIELD, GEORGE HAWKINS, OLIVER ANDREWS AND MERRILL TODD

STATEMENT OF THE CASE

The Petition for Certiorari before this Court is the latest and, Respondents hope, final round in a sequence of litigation instituted by the Petitioner against the small Town of New Boston, New Hampshire dating back to 1974. The time and expense devoted to this litigation by the

Town has been extraordinary (*see, e.g.* A. 673-678);[1] responding to it is made even more difficult by the constantly shifting nature of the Petitioner's claims. Two issues were presented to the First Circuit Court of Appeals: (1) "whether the District Court erred in granting summary judgment against John Raskiewicz, on all or any of his claims", those claims having been originally set forth in an 85-page complaint seeking damages of Ninety Million Dollars ($90,000,000.00), and (2) "whether the District Court's imposition of sanctions against John Raskiewicz and his trial counsel was erroneous." The First Circuit having answered both questions in favor of Respondents, Petitioner now seeks to have this Court consider seven additional issues without once addressing this Court's statement in Supreme Court Rule 17 of the controlling grounds for granting certiorari. That fact alone, the Respondents respectfully suggest, should be dispositive of the instant Petition.

The alleged and record facts and procedural posture of this case are fairly and accurately set forth in the Opinion below (PA 1-13). Essentially, this is an attempt by the petitioner to premise constitutional (42 U.S.C. §1983) and antitrust (Sherman Act, 15 U.S.C. §1) claims on the enforcement by the New Boston Selectmen of a lawfully-enacted gravel permit ordinance, the constitutionality of which has been upheld by the New Hampshire Supreme Court, *Flanagan v. Town of Hollis,* 112 N.H. 222, 293 A.2d

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[1] References to the record below refer to the Appendix before the Court of Appeals and will be cited as "A" followed by a page number. Citations to the opinions below will be from the appendix to the petition for writ of certiorari and will be cited as "PA" followed by a page number.

328 (1972), and which was not challenged below. Normally, the Respondents would be content to leave their Statement of Facts at that.

However, the Respondents Town and Selectmen are concerned by the number of factual errors and misrepresentations in the Petitioner's Statement of the Case. For example, Petitioner states that at the time the District Court held its hearing, "discovery was at a standstill." In fact, the Respondents had agreed to make themselves available for deposition, provided the Petitioner was likewise made available; and it was only due to scheduling difficulties on both sides and lack of follow-up by Petitioner's counsel that these were not held. (*See, e.g.,* App. 785.) Additionally, the Respondents produced, not "a few" (as claimed by Petitioner), but virtually *all* the unprivileged documentation in their possession relevant to the case (none of which, except for the transcript of the 1976 State court hearings, was submitted by the Petitioner to the Court in opposing the Motion for Summary Judgment) (A. 324, 598-600, 605-606). In any event, since the First Circuit construed the facts, as it was obliged to do, in a way most favorable to Petitioner, (PA 2) it is difficult to see what Petitioner could have gained by additional discovery.

The Petitioner refers to his state court litigation. Not only does he erroneously state that it included a claim for "damages" (Petition for Writ of Certiorari at 5, 9; *see* A. 1261), but he also fails to acknowledge that it was *he* who voluntarily relinquished his so-called First Amendment right when he abandoned that lawsuit (PA 7, 30). He also sold the subject land—not for a "distressed price", as he claims, but for Two Hundred Seventeen Thousand

Dollars ($217,000.00), (PA 9), Two Hundred Thirteen Thousand Dollars ($213,000.00) more than he paid for it (PA 2).

The most egregious misstatement or omission, however, as earlier noted, is that the claims Petitioner now seeks to raise before this Court were never briefed and argued, at least in the fashion he now seeks to present them, to the First Circuit. One searches Petitioner's Brief below in vain for a reference to 36 of the 49 cases he has cited to this Court. The "First Amendment" claim upon which the Petitioner relies so heavily *now* was not even alleged in his Complaint; and the only reference to it in his Brief below is in a footnote (Brief for Appellant at p. 8, n. 7). Supreme Court Rule 21.5 provides that "[t]he failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." Because petitioner has failed to comply with this Rule, and because this Petition raises no special or important issues of the type specified in Supreme Court Rule 17, which would warrant exercise of this Court's discretion to grant certiorari, the Petition should be denied.

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REASONS FOR DENYING THE WRIT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT PRESENTS NO REASONS OF THE TYPE SPECIFIED IN SUPREME COURT RULE 17 WHICH MERIT THIS COURT'S REVIEW; BECAUSE IT FAILS TO PRESENT THE FACTS AND ISSUES IN AN ACCURATE AND CLEAR FASHION; AND BECAUSE THERE IS NO SHOWING THAT THE CONCURRENT FINDINGS OF BOTH COURTS BELOW THAT THE CASE RAISES NO GENUINE ISSUES OF MATERIAL FACT SUFFICIENT TO SUPPORT A JUDGMENT FOR PETITIONER WERE ERRONEOUS.

There are essentially three reasons for denying the Petition for Certiorari: (1) the absence of any special or important reasons of the type specified in Supreme Court Rule 17 for granting the Writ; (2) Petitioner's failure to comply with Supreme Court Rule 21.5; and (3) the absence of any special circumstances to justify setting aside the concurrent findings of *both* lower courts that this case raises no genuine issues of material fact sufficient to support a judgment in Petitioner's favor.

While ignoring Supreme Rule 17,[2] Petitioner attempts to convert what were essentially adverse factual determinations by the two lower courts into a claim that, by finding that he had failed to allege or prove any genuine issues of material fact, the United States Court for the District of New Hampshire and the United States Court of Appeals

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[2] Respondents do not address Rule 17 in detail in this Brief, but refer to and concur with the arguments made in the Brief of Respondents Manchester Redimix Concrete, Inc. and Norman Bissonnette.

for the First Circuit failed to recognize his rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. This Court, however, has clearly recognized the propriety of, and indeed, strongly encouraged summary judgment in cases such as this. *See, e.g. Harlow v. Fitzgerald,* 457 U.S. 800, 814-819 (1982); *Butz v. Economou,* 438 U.S. 478, 507-508 (1978). (Summary judgment in civil rights actions against government officials proper on, *inter alia,* ground of official immunity.)

Yet, though thinly disguised as an appeal on issues of *law,* what the Petitioner is really asking this Court to do is to make additional findings of *fact,* or to find that there exist genuine and material factual disputes, despite the lack of support therefor in the record. In *Southern Power Co. v. Public Service Co.,* 263 U.S. 508 (1924) this Court dismissed a Petition for Writ of Certiorari on this basis. The Petition in *Southern Power Co. v. Public Service Co.,* 263 U.S. 508 (1924) *alleged* an important question of constitutional law, but arguments before this Court revealed that the relevant issue was primarily one of fact.

In the instant case, the Petitioner makes much of his claim that the Town of New Boston deprived him of what he says is his "First Amendment right of access to the courts." The *fact* is that the Petitioner, of his own accord, chose not to pursue his action in the New Hampshire courts. (PA 7, 30) That he now seeks to challenge the decisions of the courts below on, *inter alia,* the ground that they allegedly incorrectly applied New Hampshire law (Petition for Writ of Certiorari, p. 1, 11-15), seems ironic, to say the least, since he voluntarily gave up the opportunity to have his case decided under New Hampshire law. In any event, the Petitioner's belated insistence upon his novel claim that

it is unconstitutional for a municipality to attempt to settle a case by conditioning its offer on termination of pending litigation is hardly an issue deserving of this Court's time, especially since it was barely mentioned in the courts below. *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Corrigan v. Buckley,* 271 U.S. 323 (1926) (only constitutional issues specifically raised in lower courts are before the Supreme Court on appeal); *Duignan v. U.S.,* 274 U.S. 195 (1927); *Virtue v. Creamery Package Mfg. Co.,* 227 U.S. 8 (1913).

In addition to his First Amendment claim, the Petitioner asserts that his rights to procedural due process under the Fourteenth Amendment and to be compensated for a deprivation of his property for the public benefit under the Fifth Amendment were denied by New Boston's initial denial of his gravel permit application. Neither the lower courts nor Respondent deny that those rights exist; it is not clear why the Petitioner devotes so much space to establish their existence. (*e.g.* Petition at 16-19) Rather, the issue on which Petitioner and the lower courts differ is whether the *facts,* as alleged by him and as established by documents and affidavits filed with the District Court, establish a violation of those rights.

The procedures followed by Respondents in acting on Petitioner's application included two hearings, and "notice" of the scope of the hearings, in the form of, *inter alia,* the gravel ordinance itself, which specified in detail the health and safety requirements to be addressed by the applicant (A. 323, PA 3-4) There is no allegation that the requirements of the ordinance were not met. Even if it could be found that these producers fell short of what the flexible concept of due procedures requires, *cf. Mathews v.*

Eldridge, 424 U.S. 319, 334 (1976), the *fact* is that the Petitioner had a full right to appeal to the New Hampshire State courts. Nowhere does he even *claim* that those appeal procedures were constitutionally inadequate. "Where a state has provided reasonable remedies to rectify a legal error by a local administrative body . . . current authority indicates that due process has been provided." *Creative Environments v. Estabrook,* 680 F.2d 822, 832, *n.* 9 (1st Cir. 1982), *cert. denied* 459 U.S. 989 (1982), *citing Ingraham v. Wright,* 430 U.S. 651 (1977); *Parratt v. Taylor,* 451 U.S. 527, 542 (1981). *See also, Hudson v. Palmer,* — U.S. —, 104 S. Ct. 3194 (1984); *City of Eastlake v. Forest City Enterprises, Inc.,* 426 U.S. 668, 677 (1976).

Petitioner also suggests that the alleged bias of the Board of Selectmen contributed to the claimed denial of his due process rights. He premises his claim, not on federal constitutional grounds, but on a New Hampshire Supreme Court decision, *Winslow v. Town of Holderness Planning Board,* — N.H. —, 408 A.2d 114 (1984). a case decided after the entry of summary judgment in this case, on *state law* grounds. Petitioner asserts this claim based on an alleged statement by Respondent Selectman Roland Sallada that Petitioner "would never receive a permit." The lower courts accepted this allegation as true only for the purpose of the summary judgment motion. As a matter of fact, Mr. Sallada denies he ever made the statement. Even if he did so, however, the allegation is immaterial. As *Winslow* illustrates, Petitioner had adequate remedies in the state court system, and the Town (including then Selectman Sallada) in fact twice offered Petitioner a permit. (A. 302-317).

As to whether the Petitioner's property was "taken" without just compensation, this Court has held that there is no Fifth Amendment violation where the application of a local land use regulation falls short of depriving a landowner of the "economically viable use of his land." *Agins v. Tiburon,* 447 U.S. 255, 260 (1980). (Supreme Court will not review demurrer granted by State court despite uncontroverted allegation that zoning ordinance in question "completely destroyed the value of [appellant's] property for any purpose or use whatsoever." *Id.* at 259, n. 6) *See also, Kirby Forest Industries, Inc. v. U.S.,* — U.S. —, 104 S. Ct. 2187 (1984) (Impairment of value, even substantial reduction of attractiveness to potential purchasers, doesn't result in unconstitutional taking, at least in absence of right to dispose of land). This Court has specifically upheld the application of an ordinance prohibiting land excavation in circumstances much more compelling than the Petitioner's, where the property owner had been operating a sand and gravel business for thirty years. *Goldblatt v. Hempstead,* 369 U.S. 590 (1962). (Ordinance not unconstitutional merely because it deprives property of its most beneficial use.)

The *facts* of the instant case are that Petitioner had owned his land for ten years before he sought to remove gravel from it (A. 732), that he had derived income from it through lumber operations, (A. 845, 942, 996-997, 1055-1062), and that he was able to sell his land in 1979 for a profit of $213,000.00 (A. 732, 409-486). Under these circumstances Petitioner has simply failed to state a Fifth Amendment claim.

In addition to his constitutional claims, the Petitioner attempted, obviously because of the attractive prospect of

treble damages, to raise an antitrust claim. Again, his Petition ignores the factual basis on which *this* claim was dismissed. Though his Petition states that he "alleged collusive activity by the [New Boston] Board [of Selectmen], Redimix and others to deny him a permit", (Petition for Writ of Certiorari at 20) the fact is that no such collusion existed, nor does the record support any allegation thereof.

> It is uncontested that Redimix had no involvement with the Town or Raskiewicz before Raskiewicz's agent contacted the company in the summer or fall of 1979. At that point in time, Raskiewicz had twice been offered a permit after extensive negotiations, had chosen not to accept them, and, by his own admission, had given up his quest for a permit. The timing of Redimix's entry on the scene alone punctures the inference that the Board and Redimix conspired to deprive Raskiewicz of a permit during the years he sought one (1974-1979).

(PA 16).

Given the facts of this case, and the state of the law when Petitioner initiated this lawsuit in 1983, the imposition of sanctions against Petitioner by the District Court was clearly justified. In addition, the District Court's Order was justified by the reckless and vexatious manner in which the Petitioner sought to litigate his claims. His $90 million dollar lawsuit was brought, not only against the Town, its present and former selectmen, the purchaser of Petitioner's land, and one of its officers individually, but also against all of the New Boston townspeople who had sought to exercise their *own* First Amendment rights to oppose Petitioner's attempt to obtain a gravel permit, both at the Town level and in the New Hampshire State courts. The Petition for Writ of Certiorari contains no mention of

that fact, even though one of those people, Patricia Getman Andrews, *remains* to this day as a party. The judgment in her favor by the District Court has not been satisfied and at no time has she been dismissed as a party; yet, perhaps recognizing the utter baselessness of his claim against her, the Petitioner has not even *listed* her as a party to this proceeding. (Petition at iii).

While failing to now acknowledge his initial claim against the townspeople, Petitioner recklessly seeks to add yet *another* party to his ephemeral "conspiracy"—the United States District Court judge who entered the Order below. Petitioner belatedly claims that Judge Martin F. Loughlin should have *sua sponte* disqualified himself from the proceedings below on the basis that, as a then New Hampshire State judge, he "heard this case below" (meaning the state court proceedings). (Petition at 6, n. 3) That assertion is absolutely *false,* and Petitioner knows it. The state court case was heard by a Master, pursuant to local rules and procedures. The only action taken by then New Hampshire Superior Court Justice Loughlin in the State case was to sign a decree on July 8, 1977, on the basis of the Master's Order, "to which there was no objection." (PA 5-6, A. 1280-1283). This fact was a matter of record at the District Court level below (A. 1255, 1284), yet no request was made by Petitioner at that time that Judge Loughlin recuse himself. To now contend that Judge Loughlin (who at no time had any "personal knowledge" of the "disputed evidentiary facts" and probably did not even remember his ministerial approval of a Master's Order five years earlier) should have recused himself on his own motion is patently frivolous, manifesting again Petitioner's bad faith, and reckless disregard of the facts throughout these proceedings.

CONCLUSION

On the basis of Supreme Court Rules 17 and 21.5, and because the concurrent findings of the two lower courts that there exist no genuine disputed issues of material fact sufficient to support a judgment in Petitioner's favor were not clearly erroneous, the below-named Respondents respectfully pray that the Petition for Writ of Certiorari be denied; that they be awarded their reasonable attorneys' fees and costs relating to said Petition (both the District and Circuit Court of Appeals before having awarded costs and fees at those levels on the ground that Petitioner's claims were specious); and for such other and further relief as may be just.

Respectfully submitted,

THE TOWN OF NEW BOSTON, ROLAND SALLADA, HAROLD STRONG, THOMAS MANSFIELD, GEORGE HAWKINS, OLIVER ANDREWS, AND MERRILL TODD

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